DOCKET

No. 08-680
Title: Maryland, Petitioner
v.
Michael Blaine Shatzer, Sr.
Docketed: November 24, 2008
Lower Ct: Court of Appeals of Maryland
Case Nos.: (124, September Term, 2007)
Decision Date: August 26, 2008
Questions Presented

Date	Proceedings and Orders
Nov 24 2008	Petition for a writ of certiorari filed. (Response due December 24, 2008)
Dec 23 2008	Brief of respondent Michael Blaine Shatzer, Sr. in opposition filed.
Dec 23 2008	Motion for leave to proceed in forma pauperis filed by respondent.
Jan 7 2009	DISTRIBUTED for Conference of January 23, 2009.
Jan 26 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 26 2009	Petition GRANTED.
Feb 18 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including April 13, 2009.
Mar 25 2009	The time within which to file respondent's brief on the merits is extended to and including June 1, 2009.
Apr 13 2009	Joint appendix filed. Statement of costs received.
Apr 13 2009	Brief of petitioner Maryland filed.
Apr 20 2009	Brief amicus curiae of United States filed.
Apr 20 2009	Brief amici curiae of Florida, et al. filed.
Apr 20 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed.
May 29 2009	Brief of respondent Michael Blaine Shatzer, Sr. filed.
Jun 3 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 5 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 29 2009	Reply of petitioner Maryland filed.
Jul 16 2009	SET FOR ARGUMENT ON Monday, October 5, 2009.
Jul 17 2009	CIRCULATED.
Jul 27 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 3 2009	Briefs received from the Court of Appeals of Maryland. (1 envelope)
Aug 8 2009	Record received from Court of Appeals of Maryland. (1 envelope)
Aug 27 2009	Record received from Circuit Court for Washington County (1 envelope)
Oct 5 2009	Argued. For petitioner: Douglas F. Gansler, Attorney General, Baltimore, Md.; and Toby J. Heytens, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Celia A. Davis, Assistant Public Defender, Baltimore, Md.

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PETITION FOR WRIT OF CERTIORARI

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No. ____

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,
Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to *Miranda*?

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland*, 405 Md. 585, 954 A.2d 1118 (2008), reversing the judgment of the Circuit Court for Washington County, Maryland, is reproduced in Appendix A. (App. 1a-81a).

The Order of the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland*, 403 Md. 304, 941 A.2d 1104 (2008), granting certiorari review before judgment in the Court of Special Appeals of Maryland on direct appeal, 's reproduced in Appendix B. (App. 82a-83a).

The unreported decision of the Circuit Court for Washington County, Maryland, Case No. 21-K-06-37799, *State of Maryland v. Michael Blaine Shatzer, Sr.*, denying Shatzer's motion to suppress, is reproduced in Appendix C . (App. 84a-98a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Washington County, Maryland, was filed on August 26, 2008. This petition is filed within 90 days of the filing of the opinion, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 16, 2006, Respondent Michael Blaine Shatzer, Sr., was charged by criminal information filed in the Circuit Court for Washington County, Maryland, Case No. 21-K-06-37799, with a sexual offense in the

second degree, sexual child abuse by a parent, second degree assault, and contributing to conditions rendering a child in need of assistance. The charges were filed in connection with Shatzer's conduct in August, 2003, involving Shatzer's three-year-old son.

Prior to trial, Shatzer moved to suppress his March 2, 2006, inculpatory statements to the police. Following a hearing on the suppression motion on August 29, 2006, the circuit court denied Shatzer's motion to suppress in a ruling in open court on September 14, 2006. (App. 84a-98a). Two witnesses testified at the suppression hearing on August 29, 2006: Detective Shane Blankenship and Detective Paul Steven Hoover. Both officers were assigned to the Criminal Investigation Division of the Hagerstown, Maryland, police department.

Detective Blankenship testified that in August, 2003, he was assigned to the Child Advocacy Center of the Criminal Investigation Division where he received a referral from Brenda Lohman, a social worker also assigned to the Center, regarding Shatzer's son's description of an event involving Shatzer. Detective Blankenship interviewed Shatzer's son, who described an incident in which his father "pulled his pants down, exposed his penis, apparently put milk on his penis and told him to lick his worm, or suck his worm, or something to that effect."

On August 7, 2003, Detective Blankenship contacted Shatzer at the Maryland Correctional Institute, where Shatzer was being held on a sex offense charge involving a different victim. Detective Blankenship told Shatzer that he was a police officer

and read Shatzer his *Miranda* rights.[1] Shatzer indicated that he understood the form, but refused to give a statement, telling Detective Blankenship that he did not want to talk about the case without an attorney present. At that point Detective Blankenship asked Shatzer to contact him when he obtained an attorney, and the interview ended. (*See* App. 85a-86a).

Detective Blankenship testified that he learned at some point in 2006 that there had been a new investigation regarding Shatzer's son's allegations. The case had been assigned to Detective Hoover because Detective Blankenship was on leave at the time the newly-reopened case was assigned. Detective Hoover mentioned the facts of the case to Detective Blankenship, and Detective Blankenship said that he had had the case before and was familiar with it, but he did not "think that there was much conversation about it after that." Detective Blankenship could not recall at the suppression hearing whether he said anything to Detective Hoover about Shatzer's terminating the interview.

Detective Hoover testified at the suppression hearing that on February 28, 2006, social worker Brenda Lohman contacted the police regarding the incident reported by Shatzer's son, and a new investigation was opened and forwarded to the detective. Ms. Lohman advised Detective Hoover that there had been an old investigation, but the disclosure on the initial investigation was not detailed enough to go forward.

Detective Hoover, accompanied by Ms. Lohman, interviewed Shatzer on March 2, 2006, over two and

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

one-half years after the questioning by Detective Blankenship. None of the three, Detective Blankenship, Ms. Lohman or Shatzer, advised Detective Hoover that Shatzer had previously asked for an attorney when he was questioned in 2003. Shatzer expressed surprise to see Detective Hoover, stating that he thought the case was over. Detective Hoover indicated that they had "opened a new file, it's the same allegations."

Detective Hoover read the *Miranda* form to Shatzer, who signed the form and agreed to talk with the officer. Detective Hoover testified that at no time did Shatzer say that he wanted an attorney. Detective Hoover stated that there was no concern in his mind when he interviewed Shatzer that Shatzer understood all of his rights, including the right to have an attorney. At the end of the half hour interview, Detective Hoover asked Shatzer if he would submit to a polygraph examination, and Shatzer agreed to submit to that test.

On March 7, 2006, Shatzer took a polygraph test. Detective Hoover testified at the suppression hearing that the procedure entailed the polygraph operator giving a standardized *Miranda* warning before any questioning or examination procedures commence. Shatzer waived his *Miranda* rights. Shatzer gave a statement, admitting to having masturbated in front of his son but claiming "I didn't force him. I didn't force him." Shatzer then became very emotional, requested an attorney, and the interview stopped. Detective Shawn Schultz, the polygraph examiner, scored Shatzer as failing the test.

The suppression court, in making its factual findings, accepted Detective Blankenship's testimony

that he contacted Shatzer at the Maryland Correctional Institution on August 7, 2003, where Shatzer was incarcerated for a child sexual abuse matter involving a different child. The court further found that, as a result of confusion that Detective Blankenship was an attorney, "or for whatever reason, [Shatzer] refused to talk to the Detective without the presence of an attorney." (App. 85a-86a).

With respect to Detective Hoover's contact with Shatzer, the suppression court found:

> Detective Hoover began an investigation February twenty-eighth, 2006 about the same sexual abuse matter that Detective Blankenship had been investigating back in 2003. Detective Hoover, however, did not know of any previous contact at that time between Detective Blankenship and the defendant nor of any request by the defendant to have an attorney present during any discussions.
>
> New information apparently had arisen because the child was then more mature, able to articulate what had happened to him several years before and the allegations against the defendant were more specific. So, because of that Detective Hoover on March second, 2006 interviewed the defendant at the Roxbury Correctional Institution. Present at that time was Brenda Lohman of the Department of Social Services, who, I believe may have been present on the August seventh, 2003 occasion when he was questioned or attempted to be questioned.
>
> On March second, 200[6] when Detective Hoover was about to question the defendant,

Miranda rights were read to him once again. He signed them, initialed them at the appropriate locations and agreed to speak with the detective. The defendant was surprised that Detective Hoover was there because alle . . . he thought allegations had been disposed of.

Once again, he signed and initialed the document, waiving his *Miranda* rights, did not ask for an attorney. I think he may have said that there was a prior interview with Detective Blankenship but there's no mention, once again, that he previously had requested an attorney. So, that had taken place on March second, 200[6].

Detective Hoover asked him to submit to a polygraph, which he agreed to. On March seventh, apparently, once again *Miranda* was read to him. He submitted to a polygraph and was interviewed once again and did not request the presence of an attorney.

He became very emotional and therefore stopped. Ms. Lohman never said anything to Detective Hoover about the defendant wanting an attorney in the past and Detective Hoover until recently, it appears, did not know of the previous investigation or specifically, that during the investigation, the discussion that Detective Blankenship had with Mr. Shatzer, that he had requested an attorney back in 2003.

Between July of . . . I'm sorry, August seventh, 2003 when Detective Blankenship saw the defendant at MCI and March sixth of 2006, when Detective Hoover interviewed the defendant at RCI, two years and seven months

had transpired and expired.
(App. 86a-87a).

In denying the motion to suppress Shatzer's statements, and rejecting Shatzer's claim that his statements were obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), the circuit court relied on a state intermediate appellate court ruling, *Clark v. State*, 140 Md. App. 540 , 781 A.2d 913 (2001), *cert. denied*, 365 Md. 527, 796 A.2d 695 (2002). (App. 89a-96a). The suppression court noted that the question in *Clark* was whether a five-year-period between the original assertion of the right to counsel and reinterrogation was enough to "vitiate the *Edwards* requirement that once a defendant asserts his right to counsel, the police cannot go re-interrogate the defendant, even if he waives his Fifth Amendment rights unless and until he has the presence of counsel." (*Id.*). The suppression court stated that in *Clark*, the court found that the five-year period "broke that chain of events for *Miranda* purposes, for Fifth Amendment and Fourteenth Amendment purposes and therefore the statements made after the reinterrogation was not inadmissible as a result of *Edwards*." (*Id.*).

The suppression court found that Shatzer's case was "very similar" because there was "a little bit more than two and a half years gap between the original interrogation, the original questioning by Detective Blankenship, the assertion of his right to counsel and the reinterrogation by Detective Hoover where he waived his right to counsel." The court found that Shatzer was "in custody throughout the entire period of time," "placed back into the general population." (*Id.*). As such, the court held:

[T]here was a break in custody for *Miranda*

> purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edward[s]*; that is to not question the defendant without having an attorney present once he asserts those rights; did not apply. So, I would find that in this case because of the significant length of time, the fact that the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, the fact that Detective Hoover did not know the defendant had asserted his rights to have an attorney back in August of 2003, all this leads the court to find that the defendant's motion to suppress the statements that he made to Detective Hoover and Detective Schultz in March of 2006 must be denied.

(App. 95a-96a).

Shatzer proceeded to trial on September 21, 2006, on a plea of not guilty submitted on an agreed statement of facts. The agreed statement of facts submitted at trial referred to the minor victim's videotaped account that the victim had performed fellatio on Respondent at Respondent's direction, after Respondent, who was standing naked in the dining room of the family home, had told his son, "[s]uck my private," and had yelled at the victim. The agreed statement also included Shatzer's statements to the police, in which Shatzer denied that his son had touched him, but admitted having masturbated three feet in front of his son and claimed: "I didn't force him. I didn't force him."

Based on the agreed statement, the trial court found Shatzer guilty of sexual child abuse by a parent. The prosecutor entered a *nolle prosequi* to the second degree sexual offenses and the remaining two charges were dismissed as barred on statute of limitations grounds.

Shatzer was sentenced on December 21, 2006, to a term of imprisonment of 15 years, consecutive to any outstanding or unserved Maryland sentence, with five years of supervised probation upon release. Shatzer noted an appeal on December 28, 2006, to the Maryland Court of Special Appeals. On February 13, 2008, the Maryland Court of Appeals issued a writ of certiorari on its own motion, prior to judgment in the intermediate appellate court. (App. 82a-83a).

In an opinion filed on August 26, 2008, the Court of Appeals of Maryland reversed the judgment of the trial court. (App.1a-81a). Citing *Edwards v. Arizona*, the Court of Appeals held that "the passage of time *alone* is insufficient to expire the protections afforded by *Edwards*." (App. 27a). Stating that, "[w]ithout further guidance from the Supreme Court," it would adhere to the bright-line rule of *Edwards*, the Court of Appeals "decline[d] to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption, because even assuming *arguendo* that a break in custody would do so, under the facts of this case, the only event that may support a break in custody was Shatzer's release back into the general prison population in between the two police interrogations." (App. 28a).

The Dissenting Opinion noted the Majority Opinion's "reluctant tone because of the lack of direct guidance from the U.S. Supreme Court regarding

limitations on the breadth of application of the *Edwards* rule," and the fact that "that the 'issue of whether the passage of time could terminate the protections of *Edwards* remains an open question.'" The dissent stated that, for "at least two independent reasons," Shatzer's case provides "sufficient cause not to apply the bright line rule of *Edwards*." (App. 46a). The dissent opined that "[a] break in time of over two years is enough to disengage the blanket rule of *Edwards*," and that "a non-pretextual break in custody here makes inappropriate application of the holding in *Edwards*." (*Id.*).

REASONS FOR GRANTING THE WRIT

As the Maryland court observed (App. 22a-44a), state and federal courts are in conflict regarding application of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), with respect to a break in custody and a substantial lapse of time before reinterrogation of a suspect who has invoked the right to counsel. Although a majority of courts conclude that a break in custody terminates the *Edwards* prohibition against further questioning of a suspect who invokes the Fifth Amendment right to an attorney (*see* App. 16a-17a & nn.6, 7 (collecting cases)), the matter has not been addressed by this Court. In addition, the issue of what, if any, time limitations apply to application of the *Edwards* rule has not been addressed by the Court. Shatzer's case presents an appropriate case for addressing these issues.

In *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991), the Court chronicled the evolution of the prophylactic rights relating to the Fifth Amendment

guarantee against self-incrimination, beginning with the "concrete constitutional guidelines for law enforcement agencies and courts to follow" set forth in *Miranda v. Arizona*, 384 U.S. 436, 441-44 (1966), which require the police to advise a suspect in custody of various rights, including the right to remain silent and the right to have a lawyer present during questioning. A "second layer of prophylaxis" was set forth in *Edwards*, 451 U.S. at 484-85, permitting police interrogation of an accused who invokes his right to counsel only if "the accused himself initiates further communications, exchanges or conversations with the police." The rule of *Edwards* was expanded in *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), establishing that, "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." The *Minnick* ruling, along with the ruling in *Arizona v. Roberson*, 486 U.S. 675, 677 (1988), that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel is made available, have been construed as establishing through *Edwards* a bright-line rule prohibiting reinterrogation unless an attorney is present or unless the suspect initiates the questioning, regardless of how much time has elapsed or the suspect's release from police custody.

Shatzer's case presents the Court with the opportunity for a two-fold examination of the application of *Edwards* and establishment of an effective prophylactic rule for the assessing an alleged *Edwards* violation. In Shatzer's case, a break in custody and the expiration of a substantial amount of time vitiated the *Edwards* concern of eliminating

police badgering. In addition, the suspect was advised of and waived his *Miranda* rights and agreed to give a statement. Police and prosecutors would be better served by a more pragmatic rule, with fewer negative societal impacts and obviation of the impairment of law enforcement efforts that results under the construction of *Edwards* employed by the Maryland court.

The protections of *Edwards*, which prohibit re-interrogation in the absence of counsel or initiation by the suspect, should terminate when there is a break in *Miranda* custody or a substantial lapse of time. Here, both of those conditions were present. There was a break in custody because, although Shatzer was being held in a correctional institution as an inmate, he was not in police custody for *Miranda* purposes after he invoked his right to counsel. Moreover, there was a two-year and seven-month lapse of time between the invocation of his right and the reinterrogation. Under these circumstances, the concern with eliminating police badgering, which is the goal of *Edwards*, is vitiated, and the police properly should be permitted to reinitiate interrogation to advise the suspect of his *Miranda* rights and ask if he wants to waive those rights and make a statement.

I. This Court has not decided whether a break in *Miranda* custody terminates a suspect's *Edwards* rights and lower courts are divided on the issue.

With respect to a police-initiated encounter after invocation of the right to counsel, the Court indicated in *McNeil* that it was "assuming there has been no

break in custody." 501 U.S. at 177. Based on the language in *McNeil*, the Maryland court recognized that "many courts have found that a break in custody exception exists to the *Edwards* rule, where the defendant was released from custody in the interim." (App. 17a-18a & nn. 6 & 7(collecting cases)). The fact that the Maryland court, in its prior decision in *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004), *cert. dismissed as improvidently granted, Maryland v. Blake*, 546 U.S. 72 (2005), "observed that '[t]here was no break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissible interrogation,'" supports the need for guidance to the courts, where the Maryland court declined to recognize the break in custody and adequate lapse of time in Shatzer's case. (App. 19a-20a).

In declining to deviate in Shatzer's case from the bright-line rule of *Edwards* to consider whether a break in custody would vitiate the *Edwards* presumption, the Maryland court noted that "[s]ince the dismissal in [*United States v. Green*, 592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993)], the Supreme Court has not granted certiorari to consider potential expiration-triggering events of protections afforded in *Edwards*, nor has it ruled that a break in custody terminates the presumption of *Edwards*." (App. 15a-16a). The Maryland court observed that "[c]ommentators and courts have been struggling with how to resolve the question of whether the protective rule of *Edwards* has remained fixed or whether the protection announced by *Edwards* ever ends." The Court of Appeals recognized that some courts have found that a break in custody terminates *Edwards*

protections based upon the rationale that it is "unacceptable" that a suspect be "forever immunized from all police-initiated custodial interrogation." (App. 22a; *see also* App. 30a ("debate continues about the legitimacy and rationale behind recognizing a break in custody exception to *Edwards*").

Subsequent to *Minnick*, the Court reaffirmed that the purpose of *Edwards* was to prevent the police from badgering an accused into waiving his *Miranda* rights. *See Davis v. United States*, 512 U.S. 452, 458 (1994) (*Edwards* "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights'") (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). *Accord Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (*Edwards* precludes authorities from badgering or overreaching that might "otherwise wear down the accused and persuade him to incriminate himself."); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (*Edwards* is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was.").

Based upon its claim of a lack of guidance from this Court, the Majority Opinion's interpretation of *Edwards*, amounting to an endorsement of permanent insulation from questioning, does not further the *Edwards* goal of "ensur[ing] that any statement made in subsequent interrogation is not the result of coercive pressures." *See Minnick*, 498 U.S. at 151. Accordingly, this Court should undertake the opportunity this case presents to address and resolve courts' confusion as to the scope of *Edwards*.

A. Absent a ruling by this Court, state and federal courts lack guidance as to whether a break in custody terminates application of the *Edwards* rule.

As the Maryland court recognized, many state and federal courts, based primarily on the Court's language in *McNeil*, 501 U.S. at 177, have recognized a break in custody exception to the *Edwards* rule. (*See* App. 17a-18a & n.6 (citing cases from the 4th, 5th, 6th, 7th, 8th, 10th and 11th federal circuits and from California, Colorado, Florida, Georgia, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Pennsylvania, and Wyoming)) *See also* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 23 & nn.90, 91 (2000) (listing federal circuits and state courts that "have embraced a rule terminating the *Edwards* presumption when there has been a break in custody"). However, courts have also relied upon prior language of the Court questioning "whether *Edwards* announced a *per se* rule, and, if so what rule," *Oregon v. Bradshaw*, 462 U.S. 1039, 1047-48 (1983) (Powell, J., concurring), concluding on that basis that "[i]f *Edwards* is to be further modified, . . . it is for the Supreme Court to do it." *United States v. Ortiz*, 177 F.3d 108, 110 (1st Cir. 1999), *citing Bradshaw*, 462 U.S. at 1047-51 (Powell, J., concurring). Allowing review of the Maryland court's decision in *Shatzer* would permit the clarification the courts are seeking.

B. Shatzer's return to the Division of Correction population did not constitute custody for purposes of Edwards.

The Maryland court Majority "decline[d] to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption," finding that "Shatzer's release back into the general prison population in between the two police interrogations" amounted to continuous government custody for *Edwards* purposes. (App. 28a-29a). In the view of the Dissenting Opinion, "[t]he Majority Opinion's ruling, combined with the facts and holding of *Roberson*[, 486 U.S. at 675], extends to almost an unfathomable scope." (App. 80a & n.26).

Indeed, other courts have rejected the Maryland court's reasoning. In *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), *cert. denied*, 538 U.S. 988 (2003), the Eleventh Circuit declined to find that *Edwards* was violated by questioning a defendant who was in custody "only in the sense that he is incarcerated as part of the general prison population." *Id.* at 1266. The court noted that:

> *Edwards* is designed to counteract the "coercive pressures" of being in custody. But for Isaacs, and many other inmates who might have invoked the right to counsel at some past time, incarceration in prison is an accustomed milieu and is far from the potentially coercive situation that gives rise to concerns over police badgering. Therefore, the concerns underlying *Edwards* and its progeny are weaker under the circumstances of this case.

Id. at 1266 (citations omitted). The Eleventh Circuit

concluded that incarceration following a conviction constitutes a break in custody, thereby ending the *Edwards* protections. *Id.* at 1267. *Accord United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000) (when Arrington transferred from police custody to correctional custody, *Edwards* presumption was inapplicable), *cert. denied*, 534 U.S. 1049 (2001).

Likewise, in *State v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991), the government argued that statements given three months after invocation of the right to counsel were not barred by *Edwards* because, although Hall remained in jail, he was not "in custody" as the term was used in *Edwards*. The Sixth Circuit noted that one could argue that Hall was more comfortable within the surroundings in which he was interrogated than the two secret service agents who interrogated him. *Id.* at 962. The court reasoned that *Edwards* cannot be interpreted to grant "a blanket protection continuing *ad infinitum*." *Id.* at 963.

In this case, after Shatzer's invocation of the right to counsel, Shatzer was returned to the correctional population, where he remained until his reinterrogation two years and seven months later. Given that the police immediately honored Shatzer's request not to speak without an attorney , and that the police had no contact with Shatzer for several years, there was no concern regarding police badgering in his case. Indeed, Shatzer's lengthy incarceration between the two interrogations resulted in the elimination of any coercive or intimidating process of rearrest and removal back into custody.

The restraints necessarily imposed by incarceration become familiar matters to an inmate and do not

create the coercive circumstances in which it must be presumed that one's will is overborne. (*See* App. 34a ("the *Isaacs*[, 300 F.3d at 1267,] and [*Arrington*, 215 F.3d at 856,] courts both viewed incarceration within the general prison population insufficient to serve as custody for the purposes of the *Edwards* rule") & n.11 (quoting Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 935 & n.174 (1997) ("[a]fter *Mathis [v. United States*, 391 U.S. 1, 4- 5 (1968)], numerous state and lower courts expressly held that not all incarceration constitutes *Miranda* custody and that 'incarceration does not *ipso facto* render an interrogation custodial'")).

As courts have recognized, release into the general prison population as a sentenced prisoner terminates both *Miranda* custody and the question-proof status conferred by an earlier invocation of the right to counsel. The inmate who has assumed his routine in prison no longer needs the extra protection that *Edwards* was designed to safeguard. In light of the break in custody issue in Shatzer's case, the Court should grant certiorari review to clarify that the *Edwards* rule precluding reinterrogation is not applicable.

II. The Maryland court's opinion does not serve the purposes of *Edwards* given that the reinterrogation was more than two years after Shatzer invoked his right to an attorney.

The concern and goal of *Edwards* is to prevent police from badgering a defendant into waiving his

previously asserted *Miranda* rights. *See Minnick*, 498 U.S. at 150. When, as in Shatzer's case, the police have honored a suspect's request for counsel for a significant period of time, and renewed questioning occurs only after a substantial time lapse and the suspect's waiver of his *Miranda* rights, the purpose behind the *Edwards* prophylactic rule is not implicated. However, notwithstanding the assumption set forth in *McNeil,* the Maryland court's language in *Blake*, or the holdings of other courts, the Maryland court nonetheless agreed with the District of Columbia Court of Appeals in *United States v. Green*, 592 A.2d at 989, "that 'only the Supreme Court can explain whether the *Edwards* rule is time-tethered.'" (App. 22a).

This Court's decisions applying the *Edwards* rule all involved repeated police-initiated questioning within a short time period after the suspect's arrest and original invocation of the right to counsel. In *Edwards*, the police reinitiated interrogation only one day after the suspect invoked the right to counsel. 451 U.S. at 479. In *Roberson*, 486 U.S. at 678, as well as in *Minnick*, 498 U.S. at 149, the time interval was three days.

After a substantial period of time, however, the presumption that the defendant wishes to proceed only in the presence of counsel is not reasonable. "It is not unusual for a person in custody who previously has expressed an unwillingness to talk or desire to have a lawyer, to change his mind and even welcome an opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). Thus, it is appropriate to allow the police to approach a suspect, give the *Miranda* warnings again, and determine whether time

has changed his desire to be questioned only in the presence of counsel.

Indeed, the strong dissent in *Minnick* characterized that opinion as establishing "an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can never validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney." 498 U.S. at 156 (Scalia, J., dissenting). The dissent construed the interpretation of the *Edwards* prohibition in that case to be perpetual, stating:

> "Perpetuality" is not too strong a term since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well.

Id. at 163. The view of the dissent was that the *Edwards* rule should cease to apply after a consultation with counsel, because the presumption that a confession is the result of "ignorance of rights" or "coercion" would have "no genuine basis in fact." *Id.*

As the Maryland court noted, in 1992 in *United States v. Green*, 592 A.2d at 985, *cert. granted*, 504 U.S. at 908, the Court undertook the question of when the protections of *Edwards* terminate. In that case, Green was arrested in July, 1989 for possession of a

controlled substance with intent to distribute and he invoked his right to counsel. *Id.* at 985. Green was remanded to the custody of juvenile authorities in connection with an unrelated matter. *Id.* at 985-96. In September, 1989 he pled guilty to a lesser included drug offense, and he remained in juvenile custody. *Id.* at 986. Before sentencing, he was charged with an unrelated murder. *Id.* In January, 1990 he was advised of his *Miranda* rights, and he waived his rights and confessed to his involvement in the murder. *Id.*

The District of Columbia Court of Appeals addressed the government's argument that *Edwards*, *Roberson*, and *Minnick* were distinguishable based on the "sheer length of time" between the invocation of the right to counsel and the police questioning. *Id.* at 988. Although agreeing that there was "a substantial argument" that the concern in *Edwards*, of police badgering and coercion, was inapplicable to interrogation five months after invocation of the right to counsel, the D.C. court stated that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid." *Id.* at 989. The court held that, until the Supreme Court provided further guidance, as long as the defendant remained in custody, a five month lapse in time did not justify a departure from *Edwards*.[2] This Court did not issue an opinion because

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[2] The court stated that it had "no occasion to decide whether different considerations would come into play if the

Green died during the pendency of the case and the Court dismissed the case after oral argument. 507 U.S. at 545 (1993). Since its dismissal of *Green,* this Court has not decided whether a substantial lapse of time terminates the *Edwards* protection. *Shatzer* now presents the Court with an appropriate opportunity to do so.

Lower state and federal courts have indicated that the protection of *Edwards* terminates after a significant lapse of time. Indeed, in the Maryland intermediate appellate court ruling in *Clark*, 140 Md. App. at 599, 781 A.2d at 947, the court held that a five-year lapse of time between invocation of the right to counsel and re-interrogation terminated the *Edwards* protections when Clark remained in jail during that time. The court rejected the argument that the time lapse made no difference, stating that such a rule "would produce absurd results. It would create a class of prisoners who are forever question-proof." *Id.* The court further stated that applying the *Edwards* rule in that case "would not help achieve *Edwards*'s goal of preventing police badgering, nor would it accomplish any other discernable public good." *Id.* at 599; 781 A.2d at 947-48.

As the Maryland court noted:

> Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to the rule is not

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defendant, although still in custody, were transferred to the general prison population following imposition of sentence." *Id.* at 990, n.8.

> required. Put another way, when as here, "the factual circumstances of the case fall into a predictable potentially recurring pattern to which the underlying policy of *Miranda* and *Edwards* cease to apply, then so too does the bright-line of *Edwards* cease to shine."

Id., *quoting Kochutin v. Alaska*, 813 P.2d 298, 310 (Alaska Ct.App. 1991) (Bryner, J., dissenting), *vacated on rehearing*, 875 P.2d 778 (1994). Other courts have similarly recognized that coercion should not be presumed when there is a significant lapse of time between invocation of the right to counsel and subsequent reinterrogation and, if the suspect waives his right to counsel, the statements may be admissible. *See Hill v. Brigano*, 199 F.3d 833, 842 (6th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000); *Holman v. Kannah*, 212 F.3d 413, 419 (8th Cir.) (recognizing a lapse in time as a scenario that will militate against a finding of an *Edwards* violation), *cert. denied*, 531 U.S. 1021 (2000). As the Court has recognized, a bright-line rule is justified only where it fits the problem it is intended to remedy. *McNeil*, 501 U.S. at 182 (guidelines for judicial review of prophylactic rules should be "clear and unequivocal" to "guide sensibly").

Where, as in Shatzer's case, the police waited more than two years and six months after his request for counsel before reinterrogation, and where there was a break in police custody and advisement of *Miranda* rights, it is appropriate to conclude that the *Edwards* presumption of coercion is inapplicable. Accordingly, this Court should grant certiorari review to confirm that, after Shatzer was read his *Miranda* rights, waived those rights and agreed to talk to the police, his statements were properly admitted into evidence.

III. The substantial impairment of law enforcement interests resulting from the Maryland court's interpretation of *Edwards* outweighs any benefit of the application of a bright line prophylactic rule.

Edwards aims to ensure "that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick*, 498 U.S. at 151. Because of the fact that "subsequent interrogation" is permissible and contemplated, the result of the Maryland Majority Opinion's interpretation is correctly construed by the Dissenting Opinion making suspects "forever unquestionable." (App. 80a (Dissenting Opinion)). As the Dissenting Opinion accurately observes, the Majority Opinion's interpretation of the *Edwards* prophylactic rule discourages police from investigating new leads and impedes resolution of dormant or "cold cases." (*Id.* at 80a-81).

The Dissenting Opinion proposes evaluating the *Edwards* rule under a test akin to and derived from the examinations propounded in *Missouri v. Seibert*, 542 U.S. 600 (2004), for evaluating two-step interrogations. The dissent's proposal is eminently reasonable in cases such as Shatzer's, and would further the goals of police and the public. (*See* App. 59a-66a (Dissenting Opinion)). Under the state court dissent's proposal, reinterrogation of a suspect, following a break in custody and passage of a substantial lapse of time, would be evaluated under one of a combination of three inquiries. A multi-factor test would evaluate if "the [*Miranda*] warnings effectively advise the suspect that he had a real choice

about giving an admissible statement at that juncture." Application of a good faith test would eliminate concern "that the interrogators conspired to avoid the requirements of *Miranda* by delaying an interrogation." Lastly, a curative measures test would "require that where police officers willfully avoid necessary *Miranda* warnings, subsequent statements must be excluded unless 'curative measures are taken.'" *Id.* The evaluation advocated by the Dissenting Opinion serves the goal of ensuring that the defendant who, after requesting counsel, waives his *Miranda* rights following a break in custody and expiration of a substantial lapse of time, "made a rational and intelligent choice whether to waive or invoke his rights." *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985). Evaluation of the *Edwards* rule under the facts of Shatzer's case for the guidance of courts and law enforcement is necessary and warranted.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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November 24, 2008

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 124

September Term, 2007

Michael Blaine Shatzer, Sr.

v.

State of Maryland

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Raker, Irma S. (Retired, specially assigned)
Cathell, Dale, R. (Retired, specially assigned),

JJ.

Opinion by Raker, J.
Harrell and Cathell, JJ., Dissent.

Filed: August 26, 2008

We must decide whether the Circuit Court for Washington County erred in failing to suppress statements obtained from a defendant by the police in an interrogation that occurred two years and seven months after the defendant had requested the presence of an attorney during a prior interrogation for the same crime. In particular, we are asked to decide whether the prohibition against initiating further interrogation once a defendant invokes the right to counsel, as set forth in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), was interrupted by a break in custody such that the second interrogation did not violate the defendant's constitutional rights. We shall find that no break in custody occurred and that the *Edwards* rule applied.

I.

In August 2003, Brenda Lohman, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department, made a referral to the police department regarding a child, Michael Shatzer, Jr. The referral involved allegations that appellant, Michael Blaine Shatzer, Sr., committed sexual child abuse by ordering his three-year old son to perform fellatio on him. On August 7, Detective Shane Blankenship met with Shatzer to interview him about the investigation at the Maryland Correctional Institution - Hagerstown, where Shatzer was incarcerated on an unrelated offense involving sexual child abuse of a different child. Shatzer waived his *Miranda* rights, but after Detective Blankenship explained what he wanted to discuss, Shatzer invoked his *Miranda* rights and refused to talk

without the presence of an attorney; the interview was terminated. Detective Blankenship's written report stated that "When I [Blankenship] again attempted to initiate the interview, he [Shatzer] told me that he would not talk about this case without having an attorney present."

The police closed the investigation in 2003. In February 2006, Brenda Lohman filed a new referral when the child, now older, was able to make more specific allegations. Sergeant Kifer of the Hagerstown Police Department opened a new investigation. Kifer assigned Detective Paul Hoover to the new investigation because Detective Blankenship was on leave at the time the case was assigned.[1] Shatzer was still incarcerated within the general prison population, and was housed at the Roxbury Institute. Detective Hoover interviewed Shatzer at the Roxbury Institute on March 2, 2006, where Shatzer had been transferred. It is undisputed that Shatzer remained incarcerated in a Maryland Correctional facility during the entire interim period between the first interrogation in 2003 and the interview by Detective Hoover in 2006.

At the March 2, 2006 interview, Shatzer expressed

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[1] At trial, Detective Hoover testified that he knew Detective Blankenship and saw him every day. Detective Blankenship testified that he had heard about the new investigation from Detective Hoover but did not recall whether he told Detective Hoover about Shatzer's previous request for an attorney in 2003. Detective Hoover knew about the prior investigation, but testified that he was not aware that Shatzer had previously requested an attorney.

his surprise at the renewed questioning on the matter involving his son because Shatzer thought that the investigation had been closed. Detective Hoover explained that the Hagerstown Police Department had opened a new investigation on the same matter. Detective Hoover advised Shatzer of his *Miranda* rights and Shatzer signed the waiver form, waiving his right to an attorney and his right to remain silent. At no time did Shatzer indicate that he wished to talk with an attorney. Shatzer denied the fellatio allegation but did admit to masturbating in front of his son, from a distance of about three feet away. At the end of the half hour interview, Shatzer agreed to undergo a polygraph examination. On March 7, 2006, Shatzer was again informed of and waived his *Miranda* rights, and Detective Shawn Schultz administered the polygraph examination. Detective Schultz concluded that Shatzer failed the polygraph test. Detective Hoover then joined Detective Schultz in interviewing Shatzer. Shatzer became emotional, started to cry, and said "I didn't force him. I didn't force him." At that time, he requested an attorney and the interview stopped.

One June 16, 2006, the State's Attorney for Washington County filed in the Circuit Court for Washington County a statement of criminal information against Shatzer for the offenses of second degree sexual offense, sexual child abuse, second degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer filed a motion to suppress the two statements taken by police at the March 2 and March 7, 2006, interrogations on the basis that Shatzer's prior request

for counsel in the 2003 interrogation prevented further interrogation without the presence of an attorney, under the protections afforded by *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).[2]

The Circuit Court held an evidentiary hearing and denied Shatzer's motion to suppress the statements, rejecting his claim that the statements were obtained in violation of *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880. The trial court relied on *Clark v. State,* 140 Md. App. 540, 781 A.2d 913 (2001), *cert. denied,* 368 Md. 527, 796 A.2d 695(2002), in which the Court of Special Appeals held that a break in custody occurred that vitiated the *Edwards* prohibition on re-interrogation after the invocation of a defendant's right to counsel. The Circuit Court stated as follows:

> "[T]here was a break in custody for *Miranda* purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edwards,* that is, to not question the defendant without having an attorney present once he asserts those rights, did not apply."

Shatzer waived his right to a jury trial and proceeded to trial before the court on a not guilty,

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[2] Defense counsel also filed a motion to suppress any in-court identification of the defendant, all evidence obtained from an alleged illegal search and seizure, a motion to sever the joint trial from any co-defendants and any other charges on unrelated crimes, a motion to dismiss the indictment. None of these motions are relevant to the question before us.

agreed statement of facts.[3] The court found Shatzer guilty of sexual child abuse.[4] Shatzer was sentenced to a term of incarceration for fifteen years, consecutive to any outstanding sentence, with all but five years suspended, followed by five years supervised probation.

Shatzer noted a timely appeal to the Court of Special Appeals. We granted certiorari on our own initiative to consider whether, under *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, the trial court erred in failing to suppress statements made nearly three years

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[3] The factual predicate in the agreed statement of facts included a stipulation as to testimony from Brenda Lohman, the social worker with the Washington County Department of Social Services and a videotaped interview with the child, Michael, and the statements Shatzer made in the two interviews occurring on March 2 and March 7, 2006. The State's Attorney stated in relevant part as follows:

> "[Shatzer] denied that fellatio occurred. He did admit to masturbating in front of his son and he said his son was about three feet away from him but he said his son never touched him. He did agree to a second interview with Detective Shultz and Detective Hoover, At that point, he started to cry and said 'I didn't force him. I didn't force him.'"

The court, in finding Shatzer guilty, relied upon the statements made during the second set of interrogations, stating as follows:

> "There is . . . admission of the defendant as to the act of masturbation. The Court finds that that is exploitation based on the version of events given."

[4] The State entered *a nolle prosequi* to the charge of second degree sexual offense and the court dismissed the two remaining misdemeanor charges as barred by the statute of limitations.

after appellant invoked his right to counsel and without appellant having been provided access to an attorney. *Shatzer v. State,* 403 Md. 304, 941 A.2d 1104 (2008).

II.

In reviewing a grant or denial of a motion to suppress evidence, we consider only the record from the suppression hearing *Rush v. State,* 403 Md. 68, 82-83, 939 A.2d 689, 697(2008). The suppression court's findings of fact and the credibility of testimony are accepted unless clearly erroneous. *Id.* at 83, 939 A.2d at 697. We review the evidence and all inferences therefrom in the light most favorable to the prevailing party. *Id.* We make an independent, constitutional appraisal of the record by reviewing the law and applying it to the facts of the case. *Id.*

III.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court held that, in order to comply with the Fifth and Fourteenth Amendments' prohibition against self-incrimination, a defendant has the right to remain silent and the right to an attorney. *Id.* at 479, 86 S. Ct. at 1630. Significant for our purpose today, the Court made clear that if a defendant invokes his or her Fifth Amendment right to counsel, "the interrogation must cease until an attorney is present." *Id.* at 474, 86 S. Ct. at 1628. The clarity of the holding *in Miranda* created a bright-line rule for law enforcement agencies and courts. *Id.* at 441-42, 86 S. Ct. at 1610-11. *See*

also Berkemer v. McCarty, 468 U.S. 420, 430, 104 S. Ct. 3138, 3145, 82 L. Ed. 2d 317 (1984).

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), clarified the scope of the protections afforded to a defendant who invokes his Fifth Amendment right to counsel. In *Edwards,* a defendant invoked his right to counsel, was re-interrogated by police the next morning, and at the second interrogation waived his *Miranda* rights. The Supreme Court held as follows:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Id. at 484-85, 101 S.Ct at 1884-85 (footnote omitted). Under *Edwards,* a suspect who expresses a desire to have counsel cannot be subject to further interrogation until counsel has been made available to him or her, unless the accused initiates further communication. The primary purposes of the *Edwards* rule are to ensure that any statement made in subsequent interrogation is not the result of coercive pressures, to

prevent police from badgering a defendant, and to conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness. *See Minnick v. Mississippi,* 498 U.S. 146,150-51, 111 S. Ct. 486, 489, 112 L. Ed. 2d 489 (1990).

The Supreme Court, in *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100 L.E.2d 704 (1988), refused to create an exception to *Edwards* in a case where the police interrogated a suspect regarding an unrelated offense three days after a prior interrogation where the defendant invoked his right to counsel for a different crime. The Court held that it did not matter that the detective attempting the second interrogation was not aware of the prior invocation of right to counsel, and that the onus was on the police to check the file and discover this fact. *Id.* at 687-88, 108 S. Ct. at 2101. The Court described *Edwards* as a bright-line, prophylactic rule, aimed as a corollary to *Miranda. Id.* at 680-82, 108 S. Ct. 2097-98. The *"per se* aspect of *Miranda,"* which the Court said applied in equal force to the application of the *Edwards* rule, "was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation," making the right to the presence of an attorney "indispensable to the protection of the Fifth Amendment privilege." *Id.* at 682 n.4, 108 S. Ct. at 2098 n.4 (quoting *Fare v. Michael C.,* 442 U.S. 707,719, 99 S. Ct. 2560, 2568-69, 61 L. Ed. 2d 197 (1979)).

In *Roberson,* the Court distinguished between

invoking the right to remain silent versus invoking the right to counsel, and stated that the protections afforded in the latter instance as follows:

> "As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation."

Id. at 683, 108 S. Ct. at 2099. The Court stated that any further interrogation without counsel would "surely exacerbate whatever compulsion to speak the suspect may be feeling." *Id.* at 686, 108 S. Ct. at 2100. Thus, the attempt of the police to obtain any subsequent waiver is presumed to be "the product of the 'inherently compelling pressures'" unless counsel is provided. *Id.* at 681, 108 S. Ct. at 2097-98.

The Supreme Court refused again to relax the bright-line rule *of Edwards* in *Minnick v. Mississippi,* 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). In *Minnick,* the defendant invoked his right to counsel, and then had occasion to speak with an attorney two or three times over three days. When police initiated a second interrogation, however, counsel was not present. The Supreme Court held that *Edwards'* prohibition against further interrogation still applied, stating that "[w]hatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present,

whether or not the accused has consulted with his attorney." *Id.* at 153, 111 S. Ct. at 491. Justice Scalia dissented, calling the *Edwards'* prohibition against further interrogation "perpetual" as a result of the court's decision:

> "'Perpetuality' is not too strong a term, since, although the Court rejects one logical moment at which the Edwards presumption might end, it suggests no alternative . . . the result would presumably be the same if [the second interrogation] had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well."

Id. at 163, 111 S. Ct. at 496.

In May of 1992, the United States Supreme Court granted certiorari to hear arguments in *United States v. Green,* 592 A.2d 985 (D.C. 1991), *cert. granted,* 504 U.S. 908, 112 S . Ct. 1935, 118 L. Ed. 2d 542 (May 18, 1992). In *Green,* the District of Columbia Court of Appeals affirmed the trial court's suppression of a murder confession obtained by a police interrogation conducted after the defendant had invoked his right to counsel in an unrelated matter. The original arrest involved drug charges and occurred on July 18, 1989. Green invoked his right to counsel and interrogation ceased. Green was remanded to the custody of juvenile authorities and pled guilty to attempted possession with intent to distribute cocaine. He was transported

to the Youth Center at the Lorton Reformatory prior to sentencing. On January 4, 1990, Green was charged with murder in an unrelated crime and was brought to the police station the next day for booking. At that time, he waived his Miranda rights and confessed to the murder.

Green filed a motion to suppress the confession, arguing that the second interrogation violated the protections *of Edwards*. The trial court denied the motion to suppress initially, citing the five month lapse of time between the interrogations, the less coercive environment where the defendant was held, the appointment of counsel and opportunity to consult with an attorney in between the two interrogations. The trial court reconsidered and reversed its ruling after the Supreme Court decided *Minnick v. Mississippi,* because *Minnick* made clear that the interim availability of counsel did not provide a break from *Edwards* protections, and that factor was the most significant reason for denying Green's motion to suppress. *Id.* at 986.

The District of Columbia Court of Appeals affirmed the suppression of the statement. In response to the argument that the case could be factually distinguished from Supreme Court precedent, the court noted as follows:

> "[I]f *Edwards, Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel . . . . The Supreme Court having made

> clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' 'bright-line, prophylactic . . . rule,' we are not convinced that in combination the Court would regard these two factors differently."

Id. at 988. Regarding the government's argument that the sheer lapse in time between the two interrogations should alleviate the *Edwards* protections, the court noted arguments on both sides of the issue, but held as follows:

> "Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval . . . is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards*' command."

Id. at 989-90.[5] The District of Columbia Court of

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[5] In *United States v. Green*, 592 A.2d 985 (D.C. 1991), the (continued...)

Appeals articulated the problems with allowing *Edwards* protections to expire "based on the sheer length of time" between interrogations. *Id.* at 988. The court said as follows:

> "In *Minnick,* although the relevant interval was only a matter of days, the [United States Supreme] Court emphasized 'the coercive pressures that accompany custody and that may *increase* as custody is prolonged.' . . . . Hence there is nothing in the lapse of time itself from which to deduce that [a defendant's] belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the . . . offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.
>
> . . . . If five months in custody without evidence of police 'badgering' is held sufficient to dispel

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[5](...continued)
issue of continuous custody was not before the District of Columbia Court of Appeals, because, as the Court said, "the government concedes on appeal 'that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule.'" *Id.* at 988. The Court also noted that "[s]trictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder." *Id.* at 990 n.8.

> *Edwards'* presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time — and in conjunction with what other circumstances — does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part?"

Id. at 989 (internal citation omitted) (emphasis in original). In addition, the court rejected the government's third argument for relaxing the *Edwards* prohibition, that the defendant's pleading guilty to the first offense "'reopened the dialogue with the authorities' within the meaning of *Edwards.*" *Id.* at 990. The court reasoned that since the plea was entered with the advice and assistance of counsel, it did not represent the "pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own." *Id.* at 991.

The United States Supreme Court granted certiorari to consider the arguments in *Green* on May 18, 1992. *United States v. Green,* 504 U.S. 908, 112 S. Ct. 1935, 118 L. Ed.2d 542 (1992). The Court heard oral arguments on November 30, 1992, but before the Court issued an opinion, Green died in prison and the Supreme Court dismissed the petition. *United States v. Green,* 507 U.S. 545, 113 S. Ct. 1835, 123 L. Ed. 2d 260 (1993). Since the dismissal in *Green,* the Supreme Court has not granted certiorari to consider potential expiration-triggering events of the protections afforded in *Edwards,* nor has it ruled that a break in custody

terminates the presumption of *Edwards*. *See Eugene Shapiro, Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 11 (2000)(noting that "[t]here is a certain quality to *Edwards v. Arizona* and its progeny that discourages predictions about their future development"). "Rather, a fleeting reference to continuous custody in *dictum* in *McNeil v. Wisconsin* is sometimes cited as an indication of the Court's view of the issue." *Id.* at 22.

In *McNeil v. Wilson,* 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), the United States Supreme Court found that the defendant invoked his Sixth Amendment, rather than his Fifth Amendment right to counsel, and thus *Miranda* issues were not implicated. While the issue of *Edwards* protections was not central to the disposition of the case, nonetheless Justice Scalia, writing for the majority, described the *Edwards* protection as providing as follows:

> "Once a suspect asserts the right [to counsel], not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him,' — which means, we have most recently held, that counsel must be present. If the police do subsequently initiate an encounter in the absence of counsel *(assuming there has been no break in custody),* the suspect's statements are presumed involuntary and therefore inadmissible at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."

Id. at 176-77, 111 S. Ct. at 2208 (emphasis added) (citations omitted). Subsequently, many courts have found that a break in custody exception exists to the *Edwards* rule, where the defendant was released from custody in the interim.[6]

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[6] *See, e.g., United States v. Harris,* 221 F.3d 1048, 1052 (8th Cir. 2000) (*Edwards* does not apply where the concern of police badgering "is not present in cases such as this . . . where a person is not in continuous custody and the coercive effects of confinement dissolve"); *Kyger v. Carlton,* 146 F.3d 374, 380 (6th Cir. 1998) ("*Edwards* does not, however, apply to suspects who, like Kyger, are not in continuous custody"); *United States v. Barlow,* 41 F.3d 935, 945 (5th Cir. 1994), *cert. denied,* 514 U.S. 1030, 115 S. Ct. 1389, 131 L. Ed. 2d 241 (1995); *United States v. Hines,* 963 F.2d 255, 257 (9th Cir. 1992); *In re Bonnie H.,* 65 Cal. Rptr.2d 513, 526 (Cal. Ct. App. 1997); *Keys v. State,* 606 So.2d 669, 672 (Fla. Dist. Ct. App. 1992); *State v. Alley,* 841 A.2d 803, 809 (Me. 2004); *Commonwealth v. Galford,* 597 N.E.2d, 410, 414 (Mass. 1992); *Willie v. State,* 585 So.2d 660, 666 (Miss. 1991); *State v. Harrison,* 213 S.W.3d 58 (Mo. Ct. App. 2006); *State v. Farris,* 125 S.W.3d 365, 371 (Mo. Ct. App. 2004); *Commonwealth v. Wyatt,* 688 A.2d 710, 712-13 (Pa. Super. Ct. 1997).

Many federal and state courts limited the scope of *Edwards* to continuous custody cases prior to the break in custody exception hinted at in *McNeil v. Wilson,* 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). The seminal case is *United States v. Skinner,* 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied,* 463 U.S. 1229, 103 S. Ct. 3569, 77 L. Ed. 2d 1410 (1983) (holding *Edwards* did not apply because "[w]hen Skinner left the station that afternoon, he had the opportunity to contact a lawyer or to seek advice from friends and family if he chose to do so"). *See also Dunkins v. Thigpen,* 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied,* 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989); *McFadden v. Garraghty,* 820 F.2d 654, 661 (4th Cir. 1987); *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117, 124 (7th Cir. 1987); *United States v. Geittmann,* 733 F.2d 1419, 1425 (10th Cir. 1984); *People v. Trujillo,* 773 P.2d 1086, 1091-92 (Colo. 1989);

(continued...)

A few jurisdictions have found a break in custody where a defendant, after invoking the right to counsel during interrogation for one offense, was convicted and sentenced for that offense, and subsequently was interrogated for a second, unrelated offense while incarcerated.[7]

In Maryland, this Court addressed whether a defendant's *Edwards* protections were violated after he invoked his right to counsel in *Blake v. State,* 381 Md. 218, 849 A.2d 410 (2004). Blake, a seventeen-year old male, was arrested at 4:30 a.m. in connection with a murder. During interrogation, he invoked his right to counsel. The police officers put Blake, who was dressed in only boxers and a tank top and was without shoes, in a holding cell and returned a half hour later

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[6](...continued)
State v. Bymes, 375 S.E.2d 41, 41-42 (Ga. 1989); *State v. Norris,* 768 P.2d 296, 301-03 (Kan. 1989); *In re Wells,* 532 So.2d 191, 196 (La. Ct. App. 1988); *Brown v. State,* 661 P.2d 1024, 1029-30 (Wyo. 1983).

[7] *See, e.g., Isaacs v. Head,* 300 F.3d 1232, 1263 (11th Cir. 2002) (finding the protections of *Edwards* do not apply "to a defendant in Isaacs' position — one who has already been tried and convicted of the crime for which he was taken into custody and with respect to which he asserted a right to counsel"). *See also United States v. Arrington,* 215 F.3d 855, 856-57 (8th Cir. 2000) (stating that "we find no support in *Edwards* or *Roberson* for *Arrington's* contention that the right [to counsel] 'continues *ad infinitum,*' and certainly not where, as here, the accused has entered a guilty plea and has begun serving his sentence" and stating that after pleading guilty and being transferred "from police custody to correctional custody to serve his sentence" he was "no longer 'in custody' as that term has been used in the context *of Edwards* and *Roberson*").

to give Blake a copy of the arrest warrant and statement of charges indicating that the penalty he was facing was "DEATH."[8] One of the officers then said "I bet you want to talk now, huh!" When the police returned to Blake's cell a half an hour later to give Blake some clothing, Blake asked if he could talk to police, and he then waived his *Miranda* rights.

Blake filed a pre-trial motion to suppress the incriminating statements he made to the police. The trial court granted the defendant's motion to suppress the subsequent statements, reasoning that they were taken in violation *of Edwards.* The State noted a timely appeal, and the Court of Special Appeals reversed. This Court granted certiorari and reversed the Court of Special Appeals, holding that where the police actions "amounted to the functional equivalent of interrogation, thereby violating petitioner's rights," the trial court properly suppressed subsequent statements. *Id.* at 222, 849 A.2d at 412. We held that under such circumstances, Blake's question of whether he could talk to the police related to "routine incidents of the custodial relationship" and did not serve to "'initiate' a conversation in the sense in which that word was used in *Edwards." Id.* at 237, 849 A.2d at 421 (quoting *Oregon v. Bradshaw,* 462 U.S. 1039, 1045-46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983)). Finally, we observed that "[t]here was no

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[8] The statement of charges included an incorrect assertion that the penalty for first degree murder was "DEATH," even though petitioner was not eligible for the death penalty. *See* Md. Code (2002, 2003 Cum. Supp.), § 2-202(b)(2)(1) of the Criminal Law Article.

break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissive interrogation." *Id.* at 239, 849 A.2d at 422. The United States Supreme Court granted certiorari in April 2005, *Maryland v. Blake,* 544 U.S. 973, 125 S. Ct. 1823, 161 L. Ed. 2d 722 (2005), heard oral arguments on November 1, 2005, and then dismissed the petition two weeks later as improvidently granted. *Maryland v. Blake,* 546 U.S. 72, 126 S. Ct. 602, 163 L. Ed. 2d 406 (2005).

While no other case has addressed the *Edwards* issue in this Court since *Blake,* the Court of Special Appeals in *Clark v. State,* 140 Md. App. 540, 981 A.2d 913 (2001), *cert denied,* 368 Md. 527, 796 A.2d 695 (2002), held that a five-year lapse between interrogations, between which the defendant pled guilty and was sentenced for the crime involved in the first interrogation, constituted a break in custody sufficient to serve as an exception to *Edwards.* The court said that the "five plus years appellant spent in prison after invoking his right to counsel constituted a break in custody." *Id.* at 600, 781 A.2d at 948.

IV.

Appellant argues that *Edwards* is controlling, because it creates a bright-line rule that a suspect who has requested counsel may not be subjected to further interrogation unless counsel has been made available or the suspect himself has initiated further communication. Appellant maintains that these protections must continue to be honored, irrespective of any break in custody or passage of time. He

contends that a police officer reopening an investigation is obligated to become familiar with police reports related to prior questioning, and any ignorance as to the suspect's prior request for counsel should not excuse a failure to honor that request. Appellant further argues that, because there had never been a prosecution following the first investigation, the coercive pressures *Miranda* was intended to dispel remained present, and the second interrogation amounted to badgering the appellant in the manner the *Edwards* prophylactic was intended to prevent. Appellant argues that even assuming *arguendo* that some break in custody exception to *Edwards* exists, a break in custody exception should not be recognized in this case, where he was continuously held in custody in between the interrogations.

The State argues that, because the purpose of the *Edwards* protections is to prevent police from badgering a suspect into abandoning his right to counsel, the suspect's *Edwards* protections ought to expire following either a break in custody or a substantial passage of time sufficient to diminish this concern. In furtherance of its break-in-custody argument, the State advocates a distinction between police custody and correctional custody. The State contends, in other words, that the suspect is no longer in "custody" once he is released back into a prison's general population. Furthermore, the State argues that the passage of more than two and a half years following the appellant's request for counsel vitiates the concern regarding police badgering which is the underlying rationale for *Edwards*.

V.

A.

Commentators and courts have been struggling with how to resolve the question of whether the protective rule of *Edwards* has remained fixed or whether the protection announced by *Edwards* ever ends. Finding it unacceptable that a suspect is forever immunized from all police-initiated custodial interrogation, some courts have held that the passage of time, a break in custody or the disposition of the case originally under investigation of the underlying investigation/case terminates the *Edwards* protections.

We address first the contention that a lapse in time may cause the protections of *Edwards* to expire. We are in accord with the reasoning of the District of Columbia Court of Appeals in *Green,* that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered . . . ." *Green,* 592 A.2d at 989. When the United States Supreme Court granted certiorari in *Green,* the topic of a lapse-of-time expiration to *Edwards* was discussed expressly during oral argument. After the Court questioned petitioner's counsel, the Deputy Solicitor General, as to whether his argument was that "there has been a sufficient passage of time to justify going back to him contrary to *Edwards* or that *Edwards* just wears out after 2 or 3 months?", the following questioning by Justice O'Connor took place:

"[THE COURT]: Well, it isn't clear to me what you would say. Suppose he had remained in

custody and it had been 3 months and the police hadn't asked him anything and no guilty plea Now, is that enough?

[COUNSEL FOR PETITIONER]: Yes, it is, and —

[THE COURT]: 2 months?

[COUNSEL FOR PETITIONER]: 2 months is enough and —

[THE COURT]: 1 month?

[COUNSEL FOR PETITIONER]: 1 month is enough.

[THE COURT]: 2 days?

[COUNSEL FOR PETITIONER]: 2 days is probably not enough. Now, it isn't a bright line.

[THE COURT]: It isn't even a line, is it?"

Transcript of Oral Argument at *15, *United States v. Green,* No. 91-1521, 1992 U.S. Trans LEXIS 142 (Nov. 30, 1992). The Supreme Court did not, however, unanimously support the reasonableness of *Edwards'* protections extending in perpetuity. The following exchange occurred also between the Court and respondent's counsel:

"[THE COURT]: Well, do you think Edwards has no time limits at all?

[COUNSEL FOR RESPONDENT]: That's correct.

[THE COURT]: None.

[COUNSEL FOR RESPONDENT]: No, and —

[THE COURT]: So, if the defendant is sentenced, let's say, to a life sentence in connection with the drug charge, at no time then would the Government ever be able to go back and ask him if he had waived — give him his Miranda rights and talk to him about the murder."

Id. at *25.

Since *Green,* debate continues over whether the protections *of Edwards* may expire with time. In *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990), for example, the United States Court of Appeals for the Sixth Circuit held that *Edwards* and *Roberson* did not invalidate a Fifth Amendment waiver of the right to counsel when a defendant had asked for and received appointed counsel on an unrelated charge, and a significant amount of time had passed before the second police interrogation on the new charge.[9] Judge

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[9] *United States v. Hall,* 905 F.2d 959 (6th Cir. 1990), predated *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). It is not clear whether the court's reliance in *Hall* on the availability and opportunity to consult with appointed counsel prior to the second interrogation is viable after *Minnick*. *See Minnick*, 498 U.S. at 151-53, 111 S. Ct. at 490-91 (holding that the opportunity to consult with counsel between interrogations was insufficient, and that *Edwards* requires the

(continued...)

Smith, writing for the court, stated that "neither *Edwards* nor *Roberson* can be interpreted within this appeal to grant to Hall such a blanket protection continuing *ad infinitum.*" *Id.* at 963. The concurring opinions, however, followed different reasoning. Judge Ryan concurred in the judgment, but on the grounds that Hall had invoked only his Sixth Amendment right to counsel. Judge Kennedy concurred also in the judgment, because he believed the admission of the statements at trial was harmless error, but wrote separately because in his view, *Roberson* applied. Judge Kennedy argued that "[t]he fact that he had been in custody for a substantial length of time may or may not have increased the 'pressures of custodial interrogation,'" and that the bright-line rule still applied. *Id.*

The issue of whether the passage of time could terminate the protections of *Edwards* remains an open question. *See, e.g., Eugene Shapiro, Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona,* 53 Okla. L. Rev. 11, 25 (2000) ("The passage of time . . . . issue remains open and the Court might well modify the current doctrine. Such a modification would of course require the generalization that, in fact, a protected suspect's need is not a 'perpetual' one . . . . As the duration involved lengthens, debate about the influence of time upon a suspect's helplessness is likely to decrease.")

Nonetheless, allowing *Edwards* to expire poses

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[9](...continued)
presence of counsel at the second interrogation).

difficult questions. One scholar who advocates imposing limits on the protections of *Edwards*, recognizes that while allowing Edwards protections to expire with the passage of time may have significant merit, "the passage of time, by itself, should not be enough to eradicate the suspect's *Edwards* rights." *Marcy Strauss, Reinterrogation,* 22 Hastings Const. L.Q. 359, 397 (1995). The author goes on to state as follows:

> "While the need for a bright-line rule should not be overstated, it seems to have a special poignancy here. How is a court — or a police officer in the first instance — to draw the line and determine how long is long enough? . . . . To the extent one errs, making the time interval too short, the fear of badgering and coercing confessions in violation of the Fifth Amendment becomes all too real."

Id. Although several courts from other jurisdictions suggest that the passage of time could be a factor to cause *Edwards* protections to expire, our research revealed no case that relies *solely* upon the passage of time factor standing alone.[10]

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[10] Many courts have used the length of time between interrogations as one relevant factor in considering whether a break in custody exists. *See, e.g., Hill v. Brigano,* 199 F.3d 833, 842 (6th Cir.1999) ("Taking into account both the time lapse between the impermissible interrogation and the incriminating statements by the defendant and the fact that the defendant was aware that he had been assigned counsel, we believe the trial court was correct in analyzing the admissibility of this evidence

(continued...)

In light of the Supreme Court's ultimate inability to rule on the questions addressed in *Green,* we hold that the passage of time *alone* is insufficient to expire the protections afforded by *Edwards.* To hold otherwise would create a tenuous slippery slope, whereby the protections against the coercive pressures of interrogation expire after an indeterminate time period has passed. As the District of Columbia court aptly noted in *Green:* "If five months . . . is held sufficient to dispel *Edwards'* presumption that any new waiver of rights is involuntary, then why not three months or three weeks?" *Green,* 592 A.2d at 989. We think that the fact-based analysis such a rule would require would run contrary to the bright-line rule established in *Edwards* and the purpose of

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[10](...continued)
under the initiation exception to *Edwards"), cert. denied,* 529 U.S. 1134, 120 S. Ct. 2015, 146 L. Ed. 2d 964 (2000); *Perrine v. State,* 919 So.2d 520, 524-25 (Fla. Dist. Ct. App. 2005) (stating that since "*either* a break in custody or a lapse of time may be sufficient to obviate the effect of improper police interrogation," the combination of those two factors served to expire *Edwards* protections). Other courts have suggested in *dicta* that a lapse in time would vitiate *Edwards* protections. *See, e.g., Holman v. Kenna,* 212 F.3d 413, 419 (8th Cir. 2000) (stating in *dicta* that "[o]ther circuits have noted that various factors such as a break in custody or a lapse in time may vitiate the coercive effect of an impermissible interrogation so that the admission of subsequent statements is not barred by the *Edwards* rule. We do not believe these circumstances to be exhaustive and think that other scenarios may also militate against the finding of an *Edwards* violation") (citations omitted); *United States v. Gomez,* 927 F.2d 1530, 1539 n.8 (11th Cir.1991) (suggesting but not deciding that"[i]t maybe possible for enough time to elapse between the impermissible further interrogation and the 'initiation' that the coercive effect of the interrogation will have subsided").

Edwards. Allowing a lapse of time, standing alone, as the sole factor that terminates the protection against reinterrogation without counsel, would undermine the established rule, that an accused "is not subject to further interrogation" unless either counsel has been made available or "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards,* 451 U.S. at 484-85, 101 S. Ct. at 1885. Without further guidance from the Supreme Court, we adhere to the bright-line rule that without either of these two exceptions, *Edwards* protections continue. *See also Kochutin v. State,* 813 P.2d 298, 304 (Alaska Ct. App. 1991), *vacated on other grounds,* 875 P.2d 778 (Ala. App. 1994) ("we find nothing in *Edwards* or in subsequent decisions of the Supreme Court to indicate that *Edwards* should be relaxed by the mere passage of time").

B.

We next address appellee's contention that we should recognize a break in custody exception to the *Edwards* rule. Recognition of such an exception would cause the protections of the bright-line rule in *Edwards to* expire whenever a break in custody occurs between the original invocation of counsel and the second interrogation. We decline to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption, because even assuming *arguendo* that a break in custody would do so, under the facts of this case, the only event that may support a break in custody was Shatzer's release back into the general prison population in between the two police interrogations. In our view, a suspect who remains in

continuous government custody or incarceration remains in custody for *Edwards* purposes, particularly where, as here, the second interrogation regards the same underlying crime as the first interrogation involved.

Many courts have held that a break in custody may serve to expire the protections afforded by the rule in *Edwards*. *See, e.g., Elizabeth Levy, Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards,* 20 New Eng.J. on Crim & Civ. Confinement 539,569 (1994) ("The courts have unanimously declined to extend the holding in *Minnick* to non-continuous custody cases"); *Strauss, Reinterrogation*, 22 Hastings Const. L.Q. 359, 386 (1995) ("Virtually every court that has considered this issue has held (or noted in *dicta)* that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver"). *See also Kyger v. Carlton,* 146 F.3d 374, 380 (6th Cir. 1998) ("We hold that *Edwards* does not, however, apply to suspects who, like Kyger, are not in continuous custody. Although this is an issue of first impression in this circuit, we note that other courts have unanimously reached this conclusion"); *State v. Scanlon,* 719 N.W.2d 674, 682 (Minn. 2006) ("[M]any state and federal courts have held that a break in custody defeats the *Edwards* rule"); cases cited at n.6, *supra.* The United States Court of Appeals for the First Circuit explained the rational behind the break in custody exception in *Kyger v. Carlton* as follows:

"*Minnick* was in continuous custody, and resisted

> efforts to make him answer questions. *Id.* at 154. Kyger, by contrast, was not in jail. He was subject to periodic questioning — some custodial and some not custodial, but never under improper pressure — every two or three days. He had ample time during that period to consult with an attorney if he so desired. The concern of *Edwards* — coercive questioning by the government that deprives a suspect of the benefits of the counsel he has requested — simply is not implicated when a suspect is not in continuous custody."

Kyger, 146 F.3 d at 381.

Nonetheless, debate continues about the legitimacy and rationale behind recognizing a break in custody exception to *Edwards.* The Court of Special Appeals in *Clark v. State,* 140 Md. App. 540, 586, 781 A.2d 913, 940 (2001) noted that "[s]ince *Minnick,* there has been considerable discussion and disagreement among legal scholars as to whether there are, or at least should be, any exceptions to the seemingly 'bright-line' *Edwards* rule." The United States Supreme Court highlighted concerns about the stage at which a break in custody exception might apply to *Edwards* during the oral arguments in *Green.* The District of Columbia's primary argument in the case was as follows:

> "[T]hat the guilty plea is a dramatic change in circumstances that justifies lifting the *[Edwards]* presumption. This Court has never had occasion to consider whether the *Edwards* presumption continues in the face of a guilty verdict, let alone a guilty plea. In *Edwards,* in *Roberson,* and in

> *Minnick,* the subject was in the same position when he invoked his right to counsel as when the police reinitiated questioning, a pretrial suspect. Here, however, in the meantime, the respondent has been found guilty on the matter that led to his arrest and on which he — which triggered his *Miranda* rights in the first place."

Transcript of Oral Argument at *3, *United States v. Green,* No. 91-1521, 1992 U.S. Trans LEXIS 142 (Nov. 30,1992). The United States Supreme Court posited "whether the cutoff time might not be the sentencing on the drug charge rather than the entry of the plea." *Id.* at *7-8. Thus, the focus of the Supreme Court's concern was whether a guilty plea or conviction on the charge that led to the first interrogation was a relevant intervening event that might cause *Edwards* protections to expire with respect to a second interrogation on an unrelated crime. Notably, the Supreme Court asked, regarding the time between the two interrogations, "Well, he had been in custody all this time, hadn't he?", to which the counsel for petitioner acknowledged "He had been in custody." *Id.* at *5.

Despite the debate about the legitimacy of recognizing a break in custody exception to *Edwards,* we need not enter the foray in this case where, as here, Shatzer was held in continuous custody as an incarcerated . prisoner during the interim period between interrogations regarding the same subject matter. The basis for the break in custody exception recognized in other courts is typically where a defendant was released from custodial interrogation

into society. *See, e.g., Kyger,* 146 F.3d at 380-81 (Kyger was questioned several times within a ten day period but was not "in continuous custody" during that time); *Scanlon, 719* N.W.2d at 683 (finding there was a break in custody where "there were months between Scanlon's invocation of his right to counsel and his subsequent statements — months in which he was not in custody. By any standard, Scanlon was therefore sufficiently 'out of custody' for his *Edwards* invocation to be nullified").

Of the few courts addressing *Edwards* in continuous incarceration situations, the reasoning behind the break in custody relies in large part on an intervening guilty plea or sentencing, the two possible relevant events identified by the Supreme Court during oral arguments in *Green,* rather than relying solely on a release into general prison population as a sufficient break in custody. The United States Court of Appeals for the Eleventh Circuit in *Isaacs v. Head,* 300 F.3d 1232, 1263 (11th Cir. 2002), framed the question as whether *Edwards* protections "do not extend to a defendant in Isaacs' position — one who has already been tried and convicted of the crime for which he was taken into custody and with respect to which he asserted a right to counsel" and, again, "whether *Edwards* protections continue to apply to a prisoner who is in custody following conviction for the crime for which he or she initially asserted the right to deal with the police only through counsel." In holding that a break in custody ended Isaacs' question-proof status, the court based its decision in large part on the approach that "*Edwards* does not apply to a defendant *who has been convicted* and who remains in custody

only in the sense that he is incarcerated as part of the general prison population." *Id.* at 1266 (emphasis added). Thus, the court considered it relevant that the prior interrogation involving the invocation of counsel occurred prior to conviction. Similarly, the United States Court of Appeals for the Eighth Circuit in *United States v. Arrington*, 215 F.3d 855, 856 (8th Cir. 2000), held that *Edwards* protections do not continue indefinitely, and "certainly not where, as here, the accused has entered a guilty plea and has begun serving his sentence."

Isaacs and *Arrington* are factually distinguishable from the case at bar in that they involve the invocation of the right to counsel on the original charge, followed by a conviction and sentencing on that charge, and then subsequent interrogation on a new crime while incarcerated on the first charge. The Court of Special Appeals found these distinctions relevant in *Clark*, where the court noted both the length of time that had passed and "the fact that, after counsel was requested, [Clark] pled guilty to the . . . murder . . . ." *Clark*, 140 Md. App. at 598-99, 781 A.2d at 947. The court framed the inquiry in *Clark* as follows:

> "Inasmuch as there is a universally recognized 'break-in-custody' exception to *Edwards*, the question becomes whether there has been a 'break in custody' when a suspect invokes his right to counsel, but later pleads guilty, is sentenced, and is serving that sentence in prison prior to reinterrogation by the police."

Id. at 589-90, 781 A.2d at 942. By contrast, in the case

sub judice, Shatzer's two interrogations were separated *solely* by time; they involved the same underlying investigation and he did not enter a plea nor was he sentenced in the interim.

Nevertheless, the *Isaacs* and *Arrington* courts both viewed incarceration within general prison population insufficient to serve as custody for the purposes of the *Edwards* rule. The Eleventh Circuit in *Isaacs* found that "incarceration in prison is not necessarily the same as '*Miranda* custody,'" and maintained that incarceration "is the accustomed milieu for many inmates, rather than the type of coercive situation that was the source of concern in *Miranda* and its progeny." *Isaacs,* 300 F.3d at 1267. In *Arrington*, the defendant was transferred "from police custody to correctional custody to serve his sentence" and thus the court found that he was "no longer 'in custody' as that term has been used in the context of *Edwards* and *Roberson.*" *Arrington,* 215 F.3d at 856.

While *Arrington* and *Isaacs* are in keeping with the majority view that prison does not constitute *per se* custody for *Miranda* purposes without the finding of some additional restraint,[11] several jurisdictions and scholars express a contrary view. *See, e.g., United States v. Redfield,* 402 F.2d 454, 455 (4th Cir. 1968) (per curiam) (prohibiting the use of statements at trial

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[11] *See Laurie Magid, Questioning the Question-Proof Inmate,* 58 Ohio St. L.J. 883, 935 & n.174 (1997) ("[a]fter *Mathis,* numerous state and lower courts expressly held that not all incarceration constitutes *Miranda* custody and that 'incarceration does not *ipso facto* render an interrogation custodial'").

that were obtained when a prison warden questioned an inmate without giving proper *Miranda* warnings); *People v. Woodberry, 71* Cal.Rptr. 165, 168 (1968) (finding a confession obtained from an inmate *without Miranda* warnings must be suppressed); *People v. Faulkner,* 282 N.W.2d 377, 379 (Mich. Ct. App. 1979); *Blyden v. Hogan,* 320 F.Supp. 513, 519 (S.D.N.Y.1970) (granting a preliminary injunction in a class action by inmates in a city jail who were not given *Miranda* warnings before questioning, since "the plaintiffs here are clearly in custody"); *State v. LaRue,* 578 P.2d 66, 69 (Wash. Ct. App. 1978); *Inmates of Attica Correctional Facility v. Rockefeller,* 404 U.S. 809, 92 S. Ct. 35, 30 L. Ed.2d 40 (1971) (Douglas, J., dissenting); *Lederer, Miranda v. Arizona The Law Today, 78* Mil.L.Rev. 107, 129 n. 82 (1978); *Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.Car.L.Rev. 699,725-28 (1974). The view that incarceration is *per se* custody originates from a broad reading of *Mathis v. United States,* 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), in which the Supreme Court, regarding the questioning of an inmate in incarceration, said as follows:

> "The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which

> calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."

Id. at 4-5, 88 S. Ct. at 1505. Other jurisdictions do not interpret *Mathis* so broadly, but recognize that "[t]he question whether a suspect incarcerated on an unrelated offense is *de facto* in custody for all *Miranda* purposes has not been directly addressed by the U.S. Supreme Court." *State v. Tibiatowski,* 590 N.W.2d 305, 309 (Minn. 1999). The United States Court of Appeals for the Eighth Circuit, in *United States v. Chamberlain,* 163 F.3d 499 (8th Cir. 1998), stressed the importance of considering incarceration in the determination of custody, stating as follows:

> "The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody. That inquiry must include consideration of the fact of incarceration. The Supreme Court has indicated that when the individual being questioned is already in prison, '[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that . . . will weaken the suspect's will.' *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, [2397,] 110 L. Ed. 2d 243 (1990)."

Id. at 502 (citation omitted).

This Court has declined to reach the question of whether incarceration is *per se* custody. *See Whitfield v. State,* 287 Md. 124, 411 A.2d 415 (1980). In

Whitfield, the question was whether a prisoner questioned by correctional officers about the presence of a gun within the jail was subject to custodial interrogation for purposes of *Miranda,* and whether an emergency exception *to Miranda* exists.[12] We noted that "[w]hile a few courts have been willing to interpret *Mathis* in this broad fashion that prison confinement equals custody, we find that it is unnecessary to do so here since under the general test to be utilized in deciding when one is in 'custody,' which we announce today, it is clear that Whitfield was 'deprived of his freedom of action' in the *Miranda* sense at the time of questioning, without regard to the fact that he was otherwise incarcerated when it occurred." *Id.* at 139, 411 A.2d at 424 (citations omitted). Regarding the determination of whether the defendant was in custody, we noted the consideration of the following factors:

> "[T]hose facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and

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[12] In *Whitfield v. State,* 287 Md. 124, 133, 411 A.2d 415, 421 (1980).declined to recognize an emergency exception to Miranda, noting that "the United States Supreme Court itself has not placed any per se limitation on where and *when Miranda* safeguards should be applied." The Supreme Court subsequently recognized an emergency exception *in N.Y. v. Quarles,* 467 U.S. 649, 104 S. Ct 2626, 81 L. Ed. 2d 550 (1984), implicitly overruling this portion of *Whitfield.*

> whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning whether he came completely on his own, in response to a police request or escorted by police officers. Finally, what happened after the interrogation whether the defendant left freely, was detained or arrested may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning."

Id. at 141, 411 A.2d at 425 (citation omitted).

The *Whitfield* test for custody related to determining whether custody existed for *Miranda* purposes. The *Edwards* rule, however, comes into effect with the presumption that two custodial interrogations exist, during which the suspect was in custody for interrogation purposes. Any "break in custody" exception to *Edwards,* then, must mean something different than the test for determining custody for purposes of *Miranda* warnings. This Court, in discussing the difficulty of establishing what constitutes custody, has said that custody is "typically associated with formal arrest or incarceration . . . ." *Owens v. State,* 399 Md. 388, 428, 924 A.2d 1072, 1095 (2007). To determine whether continuous incarceration and a suspect's return to general prison population should be recognized as a break in custody that alleviates the need to comply with the *Edwards* rule, the more appropriate view of custody, for *Edwards* purposes, should be a test on the freedom of

movement of the individual and whether the suspect had a meaningful opportunity to secure counsel.

In Maryland, we have held that home detention constitutes "custody" for the purposes of the credit statute, Md. Code (1957, 1992 Repl. Vol., 1995 Supp.), Art. 27 § 638C(a), in *Dedo v. State*, 343 Md. 2, 9, 680 A.2d 464, 468 (1996).[13] We said as follows:

> "[T]he restraints placed upon Dedo while in home detention clearly were sufficiently incarcerative to satisfy the custody requirement of Art. 27, § 638C(a) . . . . For any unexcused or unexplained absence from his home during curfew hours, Dedo could have been charged with escape under Art. 27, § 139. Moreover, Dedo was actually committed to the custody of the Warden of WCDC, and, throughout the period of his home detention, Dedo was subject to the control of the Warden and the Home Detention staff; any violation of the home detention would have resulted in his immediate imprisonment. Dedo's movements and activities were electronically monitored through telecommunications video surveillance equipment, and he was required to permit members of the home detention staff into his home at any time of the day to install and/or inspect the monitoring

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[13] In *Deville v. State*, 383 Md. 217, 221, 858 A.2d 484, 486 (2004), we subsequently found that home detention did not meet the requirement of "confinement in a correctional institution," for the purposes of the enhanced penalty statute. *Deville* does not conflict with our decision in *Dedo v. State*, 343 Md. 2, 680 A.2d 464 (1996), as *Dedo* pertains to whether home detention constitutes custody. *See Deville*, 383 Md. at 231, 858 A.2d at 492.

> equipment and to ensure his compliance with the rules of his home detention. In addition, he was not permitted to possess or consume alcoholic beverages and was subject to random urinalysis and breath alcohol testing.
>
> "Further, we believe that where an individual is punishable for escape for any unexcused absence from the place of confinement, his confinement is necessarily involuntary."

Id. at 12-13, 680 A.2d at 469-70. The determination that home detention constitutes custody when calculating time served is in keeping with our reasoning that "[c]ustody is an elastic concept which, for the purposes of escape, connotes restraint upon a person's freedom . . . . When a person is free in every sense of the term, he or she is no longer in custody, and hence, cannot be guilty of the crime of escape." *Farris v. State,* 351 Md. 24, 33, 716 A.2d 237, 242 (1998) (ultimately holding that failure to report for weekend service at a detention center did not constitute an escape from custody because "[p]etitioner did not remain in custody during his absence from the detention center", *id.* at 34, 716 A.2d at 240, where he was free from any restriction during the week). Thus we have upheld convictions for escape where a defendant is in custody, in situations involving a defendant who left work detail at a job site without permission, *see Taylor v. State,* 229 Md. 128, 182 A.2d 52 (1962), or where a prisoner escaped from guard supervision at a hospital while receiving medical treatment, *see Best v. Warden,* 235 Md. 633, 201 A.2d 490 (1964).

Under this reasoning, Shatzer's freedom of movement and action was restricted, because presumably he was not free to simply leave the interrogation room, but had to comply with restrictions on his movement according to the rules and regulations of the correction facility and under the supervision of prison guards. Nothing had changed since Shatzer's first invocation of his right to counsel when he was subject to questioning for a second time on the same matter, and therefore there is no reason to believe that any coercive pressures driving his request for counsel had subsided.[14] The Supreme Court's reasoning in *Roberson* applies, that

> "As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation."

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[14] Contrary to the dissent's assertion, the scope of our holding is not "boundless," dissenting op. at 28. We hold merely that there was no break in custody to expire *Edwards* protections, based on the continuous incarceration of Shatzer between two interrogations for the same underlying crime, where he previously invoked his right to counsel. We do not purport to examine all situations where a break in custody might occur, *see supra* at 23. The dissent's hypothetical situations are not the subject of the case *sub judice*, and any accusation that an incarcerated individual who invokes *Edwards* is "question-proof" under today's holding is undercut by a very real and viable alternative — that the police may provide counsel and resume interrogation.

Roberson, 486 U.S. at 683, 108 S. Ct. at 2099. Instead, any further interrogation without counsel should be presumed to "surely exacerbate whatever compulsion to speak the suspect maybe feeling." *Id.* at 686, 108 S. Ct. at 2100. This is particularly true where, in Shatzer's case, both interrogations involved the same underlying crime, for which Shatzer was the only and primary suspect. Without this presumption, we see no incentive to deter police from using release back into general prison population and subsequent re-interrogation of an inmate who had previously requested counsel, rather than honoring the request.

Based on our evaluation of the meaning of custody in light of the purpose of *Edwards,* to protect an individual from coercive pressures and police badgering, we decline, without further guidance, to recognize a "break in custody" exception to the *Edwards* rule regarding an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation when the interrogation relates to the same investigation. Crafting the scope of a break in custody exception to *Edwards,* particularly in the case *sub judice* that involves continuous incarceration, without further direction from the United States Supreme Court, risks blurring the bright-line rule created by *Edwards*.

Our holding need not be so broad as to find incarceration *per se* custody for all purposes. Rather, we limit the scope to addressing the existence of a potential break in custody that would vitiate the protections *of Edwards*. We find highly pertinent the

Alaskan appellate court's explanation in *Carr v. State,* 840 P.2d 1000 (Alaska Ct. App. 1992), where the court said as follows:

> "In *Kochutin [v. State,* 813 P.2d 298 (Alaska Ct. App. 1991)] this court considered the rule *of Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 37 8 (1981), which prohibits the police from reinitiating contact with a suspect who has invoked the *Miranda* right to silence during a custodial interrogation, as long as that suspect remains in continuous custody. Kochutin was a sentenced prisoner and was interviewed in jail after having previously invoked his *Miranda* right. The state conceded that Kochutin was in *Miranda* custody when he originally invoked his right to silence. In that context, we decided that, once Kochutin had validly invoked the *Miranda* right, his continued incarceration as a sentenced prisoner qualified as continuous custody for *Edwards* purposes. We did not hold that all sentenced prisoners are *ipso facto* in Miranda custody."

Carr, 840 P.2d at 1005 n.4. We adopt a similar limitation on our holding today, and find that continuous incarceration as a sentenced prisoner qualifies as continuous custody for *Edwards* purposes. In the case of an inmate in continuous incarceration who invokes his right to counsel, the protections of *Edwards* apply until either counsel is made available to him, or he initiates further conversation with the police. We find this particularly necessary where, as in Shatzer's case, the two interrogations pertained to

the same underlying crime.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.

IN THE COURT OF APPEALS OF MARYLAND

No. 124

September Term, 2007

Michael Blaine Shatzer, Sr.

v.

State of Maryland

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Raker, Irma S. (Retired, specially assigned)
Cathell, Dale, R. (Retired, specially assigned)

JJ.

Dissenting Opinion by Harrell, J., which Cathell, J, joins.

Filed: August 26, 2008

I respectfully dissent. There are at least two independent reasons that strike me as sufficient cause not to apply the bright line rule of *Edwards*[15] to Shatzer's case A break in time of over two years is enough to disengage the blanket rule of *Edwards*. Further, a non-pretextual break in custody here makes inappropriate application of the holding in *Edwards*. Accordingly, Shatzer's 2006 statements should have been admitted.

I. A Substantial Break in Time Disengages the Protections of *Edwards*

A. The Supreme Court's Hint

The Majority Opinion adopts a reluctant tone because of the lack of direct guidance from the U.S. Supreme Court regarding limitations on the breadth of application of the *Edwards* rule, noting correctly that the "issue of whether the passage of time could terminate the protections of *Edwards* remains an open question." Majority Slip op. at21. Casting the federal research net a bit wider, however, reveals an analogous line of cases where the Supreme Court indicated that statements taken after a *Miranda*[16] violation maybe admitted after a substantial passage of time and finding the existence of curative measures. I would take the hint and conclude here that a

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[15] *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

[16] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

substantial break in time relieves the need for Shatzer to receive the protections of *Edwards*.

In *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), two police officers went to the home of a young suspect, Elstad, intent on arresting him in connection with a burglary. While one police officer discussed the arrest with the suspect's mother in another part of the house, the second officer briefly stopped in the living room with Elstad. The latter officer mentioned that he "felt" that Elstad was involved with the burglary. Elstad responded by admitting that he was at the scene of the crime. The police officers took the suspect to the police station, where he waived his *Miranda* rights and signed a confession. The trial judge excluded Elstad's admission, made in his living room, that he was at the scene of the crime, but admitted the confession made after he had received proper *Miranda* warnings. Elstad was convicted of burglary. The Oregon Court of Appeals reversed the conviction, holding that the signed confession also was inadmissible.

The Supreme Court granted certiorari to consider whether "the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." *Elstad,* 470 U.S. at 303, 105 S. Ct. at 1290, 84 L. Ed.2d 222. The Court reversed, reinstating Elstad's conviction. The Court noted that "the absence of any coercion or improper tactics undercuts the twin rationales-trustworthiness and deterrence-for a broader rule" mandating exclusion of the subsequent,

"tainted" confession. *Elstad*, 470 U.S. at 308, 105 S. Ct. at 1293, 84 L. Ed. 2d 222. The Court reasoned:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d 222.

The Court noted that "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best." *Elstad*, 470 U.S. at 313-314, 105 S. Ct. at 1295-96, 84 L. Ed. 2d 222. It explained that a failure to give a proper *Miranda* warning could be "cure[d]" by a later *Miranda* warning:

> In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's

> choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will."

Elstad, 470 U.S. at 310-311, 105 S. Ct. at 1294, 84 L. Ed. 2d 222 (quoting *Wong Sun v. United States,* 371 U.S. 471, 486, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963)).

The Court concluded:

> A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Elstad, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d 222. The need to iterate a bright line rule or test was avoided, however:

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda,* was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in

evaluating the voluntariness of his statements. .

Elstad, 470 U.S. at 318, 105 S. Ct. at 1297-98, 84 L. Ed. 2.d 222.

In *Missouri v. Seibert,* 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), the Supreme Court addressed the validity of a "two-step" interrogation. Seibert was arrested in connection with the arson of her mobile home and resulting death of a mentally-ill teenager who resided with her family. She was questioned at the police station for 30 to 40 minutes without being given *Miranda* warnings. She made several incriminating statements during that time, including an admission that she knew that the victim "was meant to die in the fire." The police then allowed her a 20 minute break for coffee and cigarettes. Before the questioning resumed, the police officer read her the *Miranda* warnings. Seibert waived her *Miranda* rights. The police then resumed exploration of her pre-warning admissions. She confirmed that the victim "was supposed to die in his sleep."

After being charged with first degree murder, Seibert moved for the suppression of both the pre-warning and post-warning statements. The police officer testified at the suppression hearing that Seibert's "ultimate statement was 'largely a repeat of information . . . obtained' prior to the warning." *Seibert,* 542 U.S. at 606, 124 S. Ct. 2601, 2606, 159 L. Ed. 2d 643. He further testified that this "two-step" strategy was a police interrogation technique in which he had been trained:

> At the suppression hearing, Officer Hanrahan testified that he made a "conscious decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once."

Seibert, 542 U.S. at 605-606, 124 S. Ct. 2601, 2606, 159 L. Ed. 2d 643.

The trial court excluded the pre-warning statements, but admitted her post-warning statements. Seibert was convicted of murder.

The Supreme Court reversed her conviction. Justice Souter wrote the plurality opinion, in which Justices Stevens, Ginsburg, and Breyer joined. Justice Kennedy wrote a concurrence, as did Justice Breyer. Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

The plurality opinion summarized the questions raised by the "two-step" interrogation procedure:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For

> unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Seibert, 542 U.S. at 611-612, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643. The plurality answered its first rhetorical question regarding the "effectiveness" of the warning given in *Seibert*:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Seibert, 542 U.S. at 613, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643. The Court implied, however, that the proximity in time of the two interrogations was a factor in determining whether the *Miranda* warnings retained their effectiveness. "[I]t would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Seibert,* 542 U.S. at 614, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643.

The Court distinguished the "two-step" procedure in *Seibert* from the unwarned admission in *Elstad*. The

Seibert Court began its analysis of *Elstad* by noting the benign nature of the interrogation in *Elstad*:

> This Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest," and described the incident as having "none of the earmarks of coercion," The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother."

Seibert, 542 U.S. at 614, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643 (citations omitted). Continuing, the *Seibert* Court stated, "[I]t is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Seibert,* 542 U.S. at 615, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

Comparing the two cases, the *Seibert* plurality crafted a list of factors that should be considered in evaluating "two-step" interrogations:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their

> object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad,* it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Seibert, 542 U.S. at 615-16, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

Those factors, applied to the facts in *Seibert* required suppression of the post-warning statements.

> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of

> only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

Seibert, 542 U.S. at 616-617, 124 S. Ct. 2601, 2612-13,

159 L. Ed. 2d 643 (citations and footnotes omitted).

Justice Breyer, although joining the plurality opinion, authored a concurrence as well. He stated that, "in my view, the following simple rule should apply to the two-stage interrogation technique: Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Seibert,* 542 U.S. at 617, 124 S. Ct. 2601, 2613, 159 L. Ed. 2d 643 (Breyer, J., concurring).

Justice Kennedy's concurrence is particularly important, as he represents the fifth vote for the judgment in *Seibert.*[17] *See, e.g., United States v. Liddy*, 478 F.2d 586, 586, (D.C. Cir.1972) (Leventhal, J., writing separately) ("I begin with the premise that the *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell (408 U.S. at 709, 92 S. Ct. at 2670) as the fifth Justice of the majority."). He began by noting that "[e]vidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its

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[17] Where the Supreme Court splits in such a 4-1-4 manner, the concurring opinion is often considered pivotal to discerning a rule to be applied from the case if it provides the narrowest legal grounds upon which a majority of Justices agree. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 n.9, 108 S. Ct. 2138, 2148 n.9, 100 L. Ed. 2d 771 (1988) ("When no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed.2d 260 (1977)).

introduction." *Seibert,* 542 U.S. at 618-619, 124 S. Ct. 2601, 2614, 159 L. Ed. 2d 643 (Kennedy, J., concurring). Justice Kennedy then compared *Elstad* with the facts in Seibert.

> In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. *See Elstad,* 470 U.S., at 309, 105 S. Ct. 1285 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."). That approach would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the . . . testimony." *Id.,* at 308, 105 S. Ct. 1285.
>
> This case presents different considerations. The

> police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Seibert, 542 U.S. at 620-621, 124 S. Ct. 2601, 2615, 159 L. Ed. 2d 643 (Kennedy, J., concurring) (omissions in original).

Justice Kennedy, however, disagreed with the plurality's multi-factor test. He noted that he would instead "apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine *the Miranda* warning." *Seibert,* 542 U.S. at 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643 (Kennedy, J., concurring). His test was:

> If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be

> excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Seibert, 542 U.S. at 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643 (Kennedy, J., concurring).

Thus, we find *in Seibert* three different tests offered to determine if a statement, after an unwarned admission, is admissible: the plurality's multi-factor test; Justice Breyer's good faith test; and Justice Kennedy's curative measures test. Under all of them, Shatzer's statements made after the 2006 *Miranda* warnings would be admissible.

1. Plurality Test

Applying the factors articulated by the plurality in *Seibert*, it is clear that Shatzer's statements would be admissible. The 2006 interrogations at issue in the present case cannot be viewed as an extension of the 2003 interrogation. The two-year break in time itself is sufficient. In addition, there was a change in interrogators and location. It may not be said that the interrogations here were "systematic, exhaustive, and

managed with psychological skill." 542 U.S. at 616, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

The *Seibert* plurality analysis inquires: "Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" 542 U.S. at 612, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643. The second question, modified to reflect the facts of this case, should be framed as: "Could the 2006 *Miranda* warnings reasonably convey that Shatzer could choose to consult an attorney before talking even if he had exercised that same right over two years earlier?" I would answer both of these questions in the affirmative. There can be no question that Shatzer was aware that he had a meaningful choice regarding his right to consult with counsel.[18]

2. Justice Breyer's Good Faith Test

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[18] The fact that Shatzer previously exercised his right to speak with an attorney provides even further indicia that he was aware he had such a choice. Shatzer witnessed first-hand how the process is designed to work. At the 2003 interrogation, after a few questions, Shatzer indicated he wished to speak with an attorney. The interrogation stopped immediately. No further questions were asked regarding the case for over two years. He witnessed the effect of his assertion of his rights. It cannot be maintained that, at the 2006 interrogations, Shatzer was unaware that he possessed a legitimate and meaningful right to consult with an attorney. Further proof of Shatzer's knowledge of his right to an attorney is supplied by his request to stop the interrogation on 7 March 2006. There, he invoked his right to consult an attorney despite his obvious emotional distress.

The actions of the interrogators here meet the definition of good faith. There is no evidence, nor could there be, that the interrogators conspired to avoid the requirements of *Miranda* by delaying an interrogation 31 months. The officers' actions were taken in the utmost good faith.

3. Justice Kennedy's Curative Measures Test

Justice Kennedy would require that, where police officers willfully avoid necessary *Miranda* warnings, subsequent statements must be excluded unless "curative measures are taken." "[A] substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances ...." *Seibert,* 542 U.S. at 622, 124 S. Ct. at 2616, 159 L. Ed. 2d 643. In Shatzer's case, there was over a two-year break in time and a new *Miranda* warning. The goal of the "curative measures" is "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.* In the present case, the police immediately ceased interrogation upon Shatzer's invocation of his *Miranda* rights. Two years later, they again read him those rights, which he voluntarily waived. A reasonable person in Shatzer's position, and indeed Shatzer himself, would "understand the import and effect of the *Miranda* warning." Thus, under Justice Kennedy's analysis, the narrowest analysis forming the five-vote majority in *Seibert,* Shatzer's post-warning statements would be admissible even if they were obtained as a result of a deliberate "two-step" interrogation.

B. Distinction between *Seibert* and the Present Case

The obvious distinction between *Seibert* and the present case is that *Seibert* involved "unwarned" statements given prior to *Miranda* warnings, warnings deliberately withheld by the police in order to conceal the rights available to the suspect. Shatzer's case does not. Shatzer invoked his *Miranda* rights, and the interrogation immediately was halted. Over two years later, the police gave Shatzer another *Miranda* warning, and he waived his *Miranda* rights. As noted above, under any of the prevailing tests in *Seibert,* especially Justice Kennedy's, Shatzer's later statements would be admissible. Under the Majority Opinion's analysis here, Shatzer's later statements are excluded. This is an unwarranted result.

The *Seibert* tests permit the introduction of statements even where the police mislead deliberately the suspect in order to avoid the protections afforded by *Miranda.* According to the Majority Opinion, by contrast, where the police act in good faith, timely give *Miranda* warnings, and honor a suspect's assertion of *Miranda* rights, a suspect's statements over two years later, even if proceeded by *a Miranda* warning, are inadmissible. The situation in *Seibert* was a far more egregious violation of the spirit and letter of *Miranda* than the technical, good faith oversight by the latter investigator in the present case. Yet, the statements in *Seibert* receive more favorable treatment. Today, the Majority Opinion essentially says to the police officers who conducted the 2006 interrogations, "We are sorry you acted in good faith and honored both the

spirit and letter of *Miranda*. Because you did so, the statements are inadmissible. If only you had withheld deliberately the *Miranda* warning, as in *Seibert,* then perhaps those statements would be admissible following a new *Miranda* warning and similar break in time." What type of police conduct is encouraged by treating statements obtained by deceit and concealment of rights more favorably than those statements obtained by honoring a suspect's *Miranda* rights? I take note of the Supreme Court's acceptance of statements preceded by egregious *Miranda* violations in *Seibert* and would hold that a substantial break in time and a second *Miranda* warning disengages the need for *Edwards'* protections where the police have acted in good faith.

C. Policy Goals of the *Miranda/Edwards*

The Majority Opinion applies the per se *Edwards* rule, refusing to recognize a break in time exception, without apparent consideration of the policy objectives behind the rule and whether they are furthered by strict application here. The Majority Opinion correctly notes that "[t]he primary"purposes of the *Edwards* rule are to ensure that any statement made in subsequent interrogation is not the result of coercive pressures, to prevent police from badgering a defendant, and to conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness." Majority slip op. at 7. None of those laudable goals are furthered by the outcome reached in the Majority Opinion.

There is no contention here, nor could there be, that

Shatzer's statements were the product of coercion. The police officers conducted the 2006 interrogations within permissible legal bounds. There is no evidence that Shatzer did not understand the nature of the interrogation or his legal rights. In *Elstad,* the Court noted that "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best." *Elstad,* 470 U.S. at 313-314, 105 S. Ct. at 1295-96, 84 L. Ed. 2d 222. I can conceive of no plausible argument that Shatzer suffered a "psychological disadvantage" because the police interrogated him a second time two years after he invoked his right to consult counsel.

The present case has nothing to do with police badgering. Detective Hoover, without actual knowledge that Shatzer previously had requested an attorney, interrogated Shatzer over two years after the original request. Two interrogations in two years is not "badgering." *See* Marcy Strauss, *Reinterrogation,* 22 HASTINGS CONST. L.Q. 359, 396-97 (1995) ("In other words, the fear *in Edwards* that repeated attempts to question the suspect will exacerbate the already significant compulsion to speak is significantly lessened when the police make no effort to question the suspect for a substantial period of time."). As the Court of Special Appeals noted in *Clark v. State,* 140 Md. App. 540, 598-599, 781 A.2d 913, 947-48 (2001):

> The practical effect of adopting the rule suggested by appellant would produce absurd results. It would create a class of prisoners who are forever question proof-even though law

enforcement officers would often have no way of knowing that the prisoner enjoys question-proof status.

Edwards, *Roberson*,[19] and *Minnick*[20] were all cases in which reinterrogation took place within three days of the prisoner's invocations of their right to counsel. The evil sought to be avoided was police badgering. But with a gap of more than five years between police interrogation sessions, it is impossible to say that the Montgomery County police "badgered" Clark into waiving his right to counsel. Application of the *Edwards* rule to cases like the one at hand would not help achieve *Edwards's* goal of preventing police badgering, nor would it accomplish any other discernable public good.

Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to the rule is not required.

The Majority Opinion notes that one of the benefits of the bright line *Edwards* rule is to "reliev[e] courts from having to make difficult determinations of voluntariness." Majority slip op. at 7. In essence, this

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[19] *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

[20] *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).

is an appeal to *Edwards'* simplicity. Nonetheless "the apparent simplicity of the prophylactic nature of the *[Edwards]* rules may be misleading. In order to avoid absurd results, the rules may have to incorporate some 'case-specific' considerations." George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis,* 1993 U. ILL. L. REV. 207, 231 (1993). *See also* Strauss, *supra,* at 361 ("Yet this seemingly clear, bright-line rule has proven remarkably blurry."). The Majority Opinion only adds to the confusion. Although attempting to preserve the simplicity of *Edwards,* the Majority Opinion holds that "in custody" *for Edwards* purposes is different than "in custody" for *Miranda* purposes. *See, infra,* part III.

Furthermore, the mere fact that no exceptions have been recognized yet for a bright line rule cannot justify not approving such an exception where called for by common sense and persuasive jurisprudence. In other words, the desirability of bright line rules "must be secondary to the content of the rules." Strauss, *supra,* at 377. The Majority Opinion inappropriately places the goal of "simplicity" above all other substantive policy objectives.

II. Break in Custody Disengages *Edwards* Protections

Although the Majority Opinion declines to address it, I would join the almost universal majority of courts and commentators that recognize that *Edwards'* protections are disengaged by a non-pretextual break in custody. *See, e.g., Kochutin v. State,* 875 P.2d 778, 779 (Alaska App. 1994) ("The continuous custody

requirement has been universally recognized by federal courts of appeal and appears to be a well-established feature of the *Edwards* rule."); Elizabeth Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards,* 20 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 539, 569 (1994) ("The courts have unanimously declined to extend the holding in *Minnick* to non-continuous custody cases."); Strauss, supra, at 386 ("Virtually every court that has considered this issue has held (or noted in *dicta)* that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver."). In sum:

> Under existing law, officials can approach an incarcerated suspect who earlier invoked his right to counsel if that inmate's question-proof status ended with a break in custody between the invocation and the later approach for questioning. Thus, a critical question for law enforcement is whether a continuously incarcerated suspect can experience a break in custody that will leave him available for questioning, notwithstanding his earlier invocation of the right to counsel.

Laurie Magid, *Questioning the Question-proof Inmate: Defining Miranda Custody for Incarcerated Suspects, 58* OHIO ST. L.J. *883, 932 (1997)* (footnotes omitted).

III. Two Years in a Correction Facility Constitutes a "Break in Custody"

In its analysis of whether a prisoner serving a

sentence at a correctional facility can experience a "break in custody," the Majority Opinion, in my view, errs.

First, the Majority Opinion appears to overlook the word "break" in "break in custody." It maintains that Shatzer was "not free simply to leave the interrogation room, but had to comply with restrictions on his movement according to the rules and regulations of the correction facility under the supervision of prison guards." Majority slip op. at 34. The point of reference seems to be the prison interrogation room. This arguably establishes that, at the exact time of the 2006 interrogations, Shatzer was in custody. It does not establish that Shatzer was in custody prior to stepping into the interrogation room. When he was in the interrogation room, in custody, the officers gave Shatzer the *Miranda* warning as required. The Majority Opinion equates Shatzer's status in the interrogation room at the prison as the same as being in the prison generally. This is not the case. Even if Shatzer was "in custody" at the time of the 2006 interrogation, he was not in custody twenty minutes, twenty days, or twenty months before that interrogation. The Majority Opinion simply is incorrect when it states that "[n]othing had changed since Shatzer's first invocation of his right to counsel . . .." Majority slip op. at 34. Something had changed. Shatzer spent many months outside of *Miranda,* and *Edwards,* custody.

The issue in the present case is not whether Shatzer was in custody while he was being interrogated in 2006. He was. Accordingly, he was given *a Miranda*

warning. The issue is whether Shatzer was in custody in his daily life at the correction facility *prior to* the 2006 interrogation. It is the lack of custody prior to the 2006 interrogation that creates the relevant"break" in custody.

Second, the Majority Opinion, curiously, relies upon a state case of statutory interpretation, *Dedo v. State,* 343 Md. 2, 680 A.2d 464 (1996), to define the term "custody" as applied to a federal constitutional right. In the name of preserving a simple "bright line" rule, the Majority Opinion adds substantial complexity to the *Miranda* doctrine. "In custody" no longer means "in custody." Under the Majority Opinion's analysis, custody means one thing under *Miranda,* and yet another thing under *Edwards*. The *Edwards* rule is a remedy designed to protect a suspect from *Miranda* violations. But, according to the Majority Opinion here, "any 'break in custody' exception to *Edwards* . . . must mean something different than the test for determining custody for purposes of *Miranda* warnings." Majority slip op. at 32. The Majority Opinion, ignoring the close, corollary relationship between "custody" in *Miranda* and *Edwards,* instead, with a bit of creativity, compares the "custody" requirement of the sentencing credit statute at issue in *Dedo*. *See Arizona v. Roberson,* 486 U.S. 675, 680, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704 (1988) (noting that the "rule of the *Edwards* case came as a corollary to *Miranda*[] ..."); Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona,* 53 Okla. L. Rev. 11, 22 (2000) (noting that the "rule *of Edwards*" is derived from the "rule of *Miranda*"). I would hold that the definition of custody

employed to determine whether a suspect should have been informed *of* his rights *(Miranda)* should be the same as the definition applied in cases where the suspect chooses to invoke those rights *(Edwards)*.

The Majority Opinion ignores the definitions *of* "in custody" provided by the progeny of *Edwards'* jurisprudential ancestor, *Miranda*. The Majority Opinion ignores a closely related federal constitutional rule regarding criminal procedure and instead utilizes an unrelated state statutory rule that concerns substantive criminal sentencing.[21] According to the Majority Opinion, "in custody" for *Edwards* purposes is better defined by a state sentencing statute than an inherently related federal constitutional rule. Majority slip op. at 33. In sum, reliance on *Dedo v. State*, 343 Md. 2, 9, 680 A.2d 464, 468 (1996), and similar cases is inappropriate.[22]

I, accordingly, would use federal constitutional law, including *Miranda* progeny, to determine the meaning of "in custody" for purposes of the *Edwards* rule.

A. Cases Addressing *Edwards* Custody

There appear to be only a few cases that address

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[21] For this reason, relying upon state criminal cases defining the crime of "escape" is inappropriate to define concepts associated with federal constitutional rights.

[22] In fact, the Majority Opinion, except for its definition of custody, relies largely on federal law. The Majority Opinion turned to a state statutory interpretation case for this point of law only.

whether a suspect is in *Edwards* custody (as distinguished from *Miranda* custody). The Sixth Circuit held that a defendant in a state penitentiary is not "in custody" for purposes of *Edwards*:

> Defendant Hall was captured and returned to the Eddyville penitentiary in August of 1988. At his arraignment, an attorney was appointed for the defendant. Hall spoke to his attorney concerning those charges. Three months later, a threatening letter was sent from the penitentiary to the President of the United States. Two Secret Service Agents questioned Hall about his involvement. The District Court held a hearing and specifically found that Hall waived his *Miranda* protection. Hall admits he answered a few questions and may have known something about the letter. Hall remained in jail, but he was there because he was already serving a prior sentence. Hall was no stranger to the state penitentiary. In fact, Hall was not 'in custody" as that term has been used in the context of *Edwards* and *Roberson*. One could readily argue that Hall was more comfortable within the surroundings in which he was interrogated than the two Secret Service agents.

United States v. Hall, 905 F.2d 959, 962 (1990). I find the analysis of the Sixth Circuit in *Hall* more persuasive than the analysis of the Court of Appeals of Alaska in *Carr v. State*, 840 P.2d 1000 (Ala. App. 1992), the only case cited by the Majority Opinion that distinguishes the definition of custody under *Edwards* from the definition of custody under *Miranda*.

Majority slip op. at 36.

Where the Majority Opinion does address federal caselaw regarding a "break in custody" under *Edwards,* its attempts to distinguish the cases are unpersuasive. The Majority Opinion seeks to distinguish *Isaacs v. Head,* 300 F.3d 1232, 1267 (11th Cir. 2002), on the ground that the suspect there was subject to a break in custody because he had been convicted of the crime for which he was interrogated previously. Upon closer analysis, however, it is apparent that the nature of prison life compared to the atmosphere in a police interrogation room was integral to the court's decision. *See Isaacs,* 300 F.3d at 1267 ("This approach recognizes that incarceration in the general prison population is the accustomed milieu for many inmates, rather than the type of coercive situation that was the source of concern in *Miranda* and its progeny.").

The Majority Opinion's distinction of *United States v. Arrington,* 215 F.3d 855, 856 (8th Cir. 2000), is similarly unpersuasive. The Majority Opinion correctly notes that the conviction and sentencing for the crime for which the suspect was interrogated was an intervening event *in Arrington.* Equally important, however, is the fact that the suspect was transferred from "police custody to correctional custody." *Arrington,* 215 F.3d at 856. "At that point, Arrington was no longer 'in custody' as that term has been used in the context of *Edwards* and *Roberson* . . . ." *Arrington,* 215 F.3d at 856-57 (internal quotation omitted).

The Majority Opinion's attempt to distinguish the Court of Special Appeals's opinion in *Clark v. State*, 140 Md. App. 540, 781 A.2d 913 (2001), falls short. The Majority Opinion contends that the *Clark* panel found "relevant" the fact that the suspect in that case, in the interval between the two interrogations, pled guilty to the crime for which his was interrogated originally. Turning to what the intermediate appellate court deemed persuasive, however, the real holding becomes clear:

> For the foregoing reasons, as well as those set forth in *Arrington*, the portion of the law review article by Magid, quoted *supra*, and Chief Judge Bryner's dissent in *Kochutin*, we hold that: (1) a break in custody is an exception to the rule set forth in *Edwards;* (2) for *Miranda* purposes, *the five plus years appellant spent in prison after invoking his right to counsel constituted a break in custody;* (3) the trial court did not violate the *Edwards* rule in denying appellant's motion to suppress his September 1998 statement to police.

Clark, 140 Md. App. at 599-600, 781 A.2d at 948 (footnote omitted and emphasis added).

B. Cases Addressing *Miranda* Custody

Applying the *Miranda* analogies, the Majority Opinion acknowledges that today's holding that incarceration constitutes custody *per se* places Maryland in the minority of jurisdictions that have considered the issue under *Miranda*. See Majority slip op. at 29 (noting the "majority view that prison does

not constitute *per se* custody for *Miranda* purposes without the finding of some additional restraint"). The majority, and better reasoned, view is that a prisoner in a correctional facility is not "in custody" for purposes of Miranda. See Magid, *supra,* at 935-36 ("After *Mathis,*[23] numerous state and lower courts

expressly held that not all incarceration constitutes *Miranda* custody and that incarceration does not ipso facto render an interrogation custodial." (internal quotation omitted)). "Eight of the twelve Circuit Courts have ruled that incarceration does not always constitute custody for *Miranda* purposes." Magid, supra, at 936.

The Fourth Circuit is in agreement:

> We also decline to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and hold that a prison inmate is not automatically always in "custody" within the meaning of *Miranda*. Conley's view of the *Mathis* decision would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial. As the Ninth Circuit pointed out, this approach would "torture *[Miranda]* to the illogical

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[23] *Mathis v. United States,* 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

> position of providing greater protection to a prisoner than to his nonimprisoned counterpart." *Cervantes,* 589 F.2d at 427. Such a result would be directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result.

United States v. Conley, 779 F.2d 970, 972-73 (1985). The Fourth Circuit noted that the better approach is to determine custody by looking "to the circumstances of the interrogation to determine whether the inmate was subjected to more than the usual restraint on a prisoner's liberty to depart." *Conley,* 779 F.2d 970, 973.[24]

Conley relied on the Ninth Circuit's opinion in *Cervantes v. Walker,* 589 F.2d 424, 428 (1978):

> The concept of "restriction" is significant in the prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to have "deprived (him) of his freedom of action in any significant way,"

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[24] The Majority Opinion here also relies upon *United States v. Redfield,* 402 F.2d 454, 455(4th Cir. 1968) (per curiam). *Redfield* holds only that the prisoner was in custody when he was at "a prison disciplinary hearing," where, presumably, the prisoner was not free to leave the room. It does not speak to the non-custodial nature of daily prison life. That distinction was clarified by the Fourth Circuit in *Conley,* discussed *infra.*

> *Miranda v. Arizona, supra,* 384 U.S. at 444, 86 S. Ct. at 1612 (footnote omitted). In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.

Cervantes, 589 F.2d 424, 428.

The logic behind the differentiation between the police station, where a suspect would be in *Miranda* custody, and daily life in a correctional facility, where a prisoner is not in *Miranda* custody, is that a contrast should be drawn between the acquired familiarity of the confines of the correction facility and the intimidating presence of a police interrogation room.

> The principal difference is in the interrogation room. *Miranda's* presumption was designed in part to influence police behavior which was sometimes spontaneous, under a range of circumstances which often included the wish to obtain a quick confession from a recently apprehended suspect. The absolute requirement that *Miranda's* procedures be implemented, coupled with an irrebuttable presumption of compulsion if they were not, was an effective tool in directing police activities. The context of *Edwards* is quite different.

Shapiro, *supra,* at 31.

> Further:
> When a defendant leaves the station house, such as on bail, and resumes the normal routines of life, the Court has recognized that he no longer requires the protection of the *Edwards* prophylactic rule. Such a defendant is entitled to the usual *Miranda* protections, but not the additional prophylactic protection of being rendered question-proof. Likewise, the inmate who has assumed his new routine in prison no longer needs the extra protection of *Edwards*. The restraints necessarily imposed by incarceration become familiar matters to inmates and do not create the coercive circumstances in which it must be presumed that one's free will is overborne.

Magid, *supra,* at 947-49.

In his dissent *in Kochutin v. State,* 813 P.2d 298, 309-10 (Alaska App. 1991), Chief Judge Bryner made a similar distinction between the police interrogation room and general prison life:

> When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of public record, the anxiety and uncertainty that support *Miranda's* finding of inherent coercion simply cease to exist. When custody is not related to any pending or unresolved matter, it seems to me that there is little cause for concern that a

police officer will appear to control the suspect's fate, at least in the absence of a showing that the officer's conduct somehow creates an atmosphere of custody going beyond that to which the suspect is accustomed in his normal setting.

If it is safe to say under existing case law that a sentenced prisoner cannot automatically be deemed to be in continuing *Miranda* custody, then it is equally safe to say that a sentenced prisoner who invokes the right to counsel upon being interrogated under circumstances amounting to *Miranda* custody and is thereafter returned to normal sentenced-prisoner status should not automatically be deemed to be in continuous custody under *Edwards*. Once returned to the ordinary routine of other sentenced prisoners-without any vestige of the inherently coercive circumstances incidental to custodial interrogation-the prisoner should be treated, for *Edwards* purposes, in the same manner as any person who has been arrested, questioned in custody, and released. [Footnote and citations omitted].

IV. Policy Implications of Today's Ruling

The ruling today has troubling policy implications.

That a rule may be easily stated, though, does not mean that it clearly guides conduct. Application of a long-lasting bar on questioning inmates is enormously difficult in practice. In determining how to proceed during an investigation in which

> an inmate becomes a suspect, a police officer would have to find out when, if ever, the inmate had invoked his right to counsel with regard to any crime and when, if ever, the inmate had been released from incarceration. This can be a highly formidable task. Many incarcerated suspects will have previously been convicted or at least questioned about numerous other crimes. Many will have been convicted or questioned in far flung parts of the country over the course of many years by law enforcement officials from many different jurisdictions. It will often be virtually impossible to determine whether a suspect who has been incarcerated for a number of years has ever invoked his right to counsel and whether he has had any periods of non-confinement after the invocation.

Magid, *supra,* at 927-28.

Under the Majority Opinion's holding, all law enforcement officers from every jurisdiction and agency[25] will be held strictly liable for failure to discover that a suspect previously had invoked the Fifth Amendment right to counsel in connection with

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[25] In *Minnick v. Mississippi,* 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), the Supreme Court reversed the murder conviction of suspect who requested an attorney in an interrogation before FBI investigators and was subsequently questioned by local authorities. Thus, the Majority Opinion's holding today, combined with the facts of *Minnick,* means that a request to speak with an attorney before one law enforcement agency will prohibit another agency from re-opening questioning of that suspect two years later.

any outstanding criminal investigation.[26] Any suspect who invokes such a right is forever unquestionable.

The scope of the holding in the Majority Opinion is boundless. For example, if an incarcerated suspect commits an assault while in prison, are investigators prohibited from interrogating the suspect regarding the newly committed assault after a new *Miranda* warning? Do they need to review the notes from every previous interrogation of that suspect in every jurisdiction and every previously opened criminal investigation to determine if he has, at any point in his life, invoked the right to counsel in a criminal charge that has not been adjudicated? If police have reason to believe that a suspect was present at a crime scene, and thus could provide vital, eye-witness information, is the suspect still off-limits, even after a proper *Miranda* warning? *See* Shapiro, *supra,* at 18 ("One wonders how *Edwards'* own invocation might be evaluated today were it to arise in the context of assessing a reinterrogation by an oblivious officer from another state, years later, about another matter.")

The Majority Opinion will discourage police from investigating new leads to older crimes if a suspect in those crimes already is incarcerated for other crimes. If the police fail to discover that at some interrogation,

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[26] In *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), the Supreme Court held that once a suspect requests counsel, police are prohibited from initiating a subsequent interrogation regarding a separate criminal investigation. The Majority Opinion's holding, combined with the facts and holding of *Roberson,* extends to almost an unfathomable scope.

years ago and by another law enforcement agency, the suspect invoked his right to have counsel present, any statements, no matter how voluntary, will be excludable. The police would be better off to wait for the suspect's release, thus ensuring a break in custody, and then interrogate the suspect. Of course, depending on the length of sentence that the suspect is serving, this delay guarantees that memories will fade, evidence will be lost, and other witnesses will move away or die. The Majority's Opinion will place another obstacle, largely clerical in nature, in front of investigators who have the already unenviable assignment of investigating dormant or "cold cases."

For all of these reasons, I would affirm the judgment of the Circuit Court for Washington County.

Judge Cathell authorizes me to state that he joins this dissent.

MICHAEL BLAINE SHATZER, SR.	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	(No. 2823, Sept. Term, 2006
	*	Court of Special Appeals)

ORDER

It is this 13th day of February, 2008

ORDERED, by the Court of Appeals of Maryland, on its own motion, that a writ of certiorari to the Court of Special Appeals shall issue in the above entitled case, and said case shall be docketed on the regular docket as No. 124, September Term, 2007; and it is further

ORDERED that counsel shall file briefs and printed record extract in accordance with Md. Rules 8-501 and 8-502; appellee's brief and record extract to be filed on or before February 27, 2008; and it is further

ORDERED that this case shall be set for argument during the May session of Court.

/s/ Robert M. Bell

Chief Judge

MICHAEL BLAINE SHATZER, SR.	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	(No. 2823, Sept. Term, 2006
	*	Court of Special Appeals)

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND

WHEREAS, MICHAEL BLAINE SHATZER, SR. v. STATE OF MARYLAND, No. 2823, September Term, 2006, is pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED TO HAVE THE RECORD TRANSMITTED TO THE COURT OF APPEALS OF MARYLAND ON OR BEFORE February 27, 2008, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 13th day of February, 2008.

/s/ Alexander L. Cummings

Clerk
Court of Appeals of Maryland

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND *

VS. *

21-K-06-37799 CRIMINAL

MICHAEL BLAINE SHATZER, SR. *

*

TRANSCRIPT OF PROCEEDINGS

Courtroom Number 3
Hagerstown, Maryland
September 14, 2006

The above entitled matter came on for hearing in open court at 1:00 P.M.

BEFORE:

THE HONORABLE JOHN H. MCDOWELL
JUDGE

Appearances:

Gina Cirincion, Assistant State's Attorney for Washington County, Maryland, Appearing on behalf of the State of Maryland

Carl Creedon, Esquire, Appearing on behalf of the Defendant

Christine B. Ellis, Court Reporter
Court House
Hagerstown, Maryland 21740

THE COURT: Good afternoon. We're here in the case of Michael Blaine Shatzer. The purpose of calling you all here today was for the Court to announce its decision in this case. This is scheduled for what? Next week?

MS. CIRINCION: Yes, next Thursday.

THE COURT: Next Thursday. Okay. So, I wanted to get this in as quickly as possible. I did give counsel time to present me any case law that would have been pertinent. But thankfully, with the help of my law clerk, I found a case that is dipositive of the issue.

Let me just go over the facts as I know them in this case. First of all, it appears that on . . . in July of 2003, Detective Blankenship received a referral from the Child Advocacy Center of the Department of Social Services regarding the defendant. At that time it was alleged that the defendant had been doing things that indicated that he was molesting, I believe it was his son.

Detective Blankenship contacted the defendant at the Maryland Correctional Institution on August seventh, 2003. At that time the defendant was incarcerated for an unrelated offense. One that, of course, dealt with a sexual abuse, child sexual abuse type of matter, but of a different child.

The defendant, Mr. Shatzer, was read his *Miranda* rights. At that time he thought Detective Blankenship was an attorney and as a result of that confusion or for whatever reason, he refused to talk to the Detective

without the presence of an attorney. The next contact he may have had, that is that detective with the defendant, was at MCI once again when there was a Department of Social Services case of some kind transpiring but he only saw the defendant. He may have said hello to him but had no occasion whatsoever to talk to him.

Ah, Detective Hoover began an investigation February twenty-eighth, 2006 about the same sexual abuse matter that Detective Blankenship had been investigating back in 2003. Detective Hoover, however, did not know of any previous contact at that time between Detective Blankenship and the defendant, nor of any request by the defendant to have an attorney present during any discussions.

New information apparently had arisen because the child was then more mature, able to articulate what had happened to him several years before and the allegations against the defendant were more specific. So, because of that Detective Hoover on March second, 2006 interviewed the defendant at the Roxbury Correctional Institution. Present at that time was Brenda Lohman of the Department of Social Services, who, I believe, may have been present on the August seventh, 2003 occasion when he was questioned or attempted to be questioned.

On March second, 2003 when Detective Hoover was about to question the defendant, *Miranda* rights were read to him once again. He signed them, initialed them at the appropriate locations and agreed to speak with the detective. The defendant was surprised that

Detective Hoover was there because alle . . . he thought allegations had been disposed of.

Once again, he signed and initialed the document, waiving his *Miranda* rights, did not ask for an attorney. I think he may have said that there was a prior interview with Detective Blankenship but there's no mention, once again, that he previously had requested an attorney. So, that had taken place on March second, 2003.

Detective Hoover asked him to submit to a polygraph, which he agreed to. On March seventh, apparently, once again *Miranda* was read to him. He submitted to a polygraph and was interviewed once again and did not request the presence of an attorney.

He became very emotional and therefore stopped. Ms. Lohman never said anything to Detective Hoover about the defendant wanting an attorney in the past and Detective Hoover until recently, it appears, did not know of the previous investigation or specifically, that during the investigation, the discussion that Detective Blankenship had with Mr. Shatzer, that he had requested an attorney back in 2003.

Between July of . . . I'm sorry, August seventh, 2003 when Detective Blankenship saw the defendant at MCI and March sixth of 2006, when Detective Hoover interviewed the defendant at RCI, two years and seven months had transpired and expired.

So, that's basically the facts as I know it. This was an interesting case and I thank counsel for bringing it

to my attention because, quite honestly, I didn't know the answer to this and I don't think anybody else did.

We know from the *Edwards* case that was cited by Mr. Creeden, *Edwards versus Arizona*, a Supreme Court case, that once a custodial interrogation takes place, pursuant to that case, the police are not allowed to resume questioning until typically a defendant re-initiates further communication with the police. And if not, during re-interrogation counsel has to be present.

In this case, of course, neither of those things occurred. The . . . in the *Edwards* case the police questioned the defendant. He asked for an attorney. The questioning temporary ceased and the next day he was re-interrogated by a different police officer after once again being re-advised of his *Miranda* rights.

The Supreme Court held that the use of the defendant's confession against him at trial violated his Fifth and Fourteen Amendment Rights to have counsel present during custodial interrogation. Other cases have reaffirmed that. *Arizona versus Robertson*, which is a case where three days after the initial interrogation where the defendant had requested the presence of counsel, a re-interrogation took place. In that case it was for a different crime and the defendant was still in jail. But once again, the Supreme Court said that *Edwards* prohibited against re-interrogation and that this applied even if the re-interrogation was unrelated to the crime that was the focus of the original questioning and even if the officer who conducts the re-interrogation was unaware that the

suspect had previously requested counsel.

Various other cases including *Michigan versus Harvey* indicate that *Edwards* . . . the holding in *Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.

And, so, that's really the status of the law. But the case that was found that is dispositive, at least for the purpose of this State's holdings, is the case of *Clark versus State*, which is 140 Md Ap, 540. It's a 2001 case.

In that case the defendant was suspected of having abducted and murdered or killed in some manner a very young girl. The defendant was interrogated several times about his involvement and . . . excuse me for a moment here, on November sixth, 1992 he was interrogated once again after a suspicious . . . time that he had spent in the State of Massachusetts.

November sixth, 2002, the defendant was deprived of sleep. He asserted his right to counsel on a number of occasions and even though he repeatedly requested counsel to be present, the police refused to allow that to take place. And although he did not incriminate himself at that time, nevertheless he did without question on a number of occasions request the presence of counsel during the interrogation.

The next year, the defendant plead guilty to an unrelated murder and the defendant was sentenced to serve thirty years incarceration. While he was

incarcerated, surprisingly or not, at one of the institutions; I believe it was MCI here or MCTC, in Hagerstown; he was re-interviewed by the Montgomery County Police officers.

At that time, once again, he was incarcerated in one of the prisons here. He was also talked to by a correctional case worker. He was re-Mirandized, waived his rights to *Miranda* and spoke to the police about the disappearance of the girl that had been missing for the past six years or so.

So, the question was, essentially, whether the five year period of time was enough to essentially vitiate the *Edwards* requirement that once a defendant asserts his right to counsel, the police cannot go re-interrogate the defendant, even if he thereafter waives his Fifth Amendment rights unless and until he has the presence of counsel.

The defendant waived his right to counsel in this case and the Court of Special Appeals held that the statements that he made to the police officers in 1998 were admissible. Several cases were pointed to by the Court of Special Appeals as supporting their decision because the Supreme Court has never ruled on a case such as this where a lengthy time period had transpired between the assertion of one's right to have counsel and the re-interrogation.

The cases that I have just mentioned, the *Edwards* case and the other two cases that I can't just put my finger on right now, the re-interrogations occurred a day later, three days later. So, certainly there was no

break in the confinement and *Edwards* did apply. But the Court of Special Appeals cited various sources with approval. One was a dissenting opinion in a State of Alaska case where there was a break in custody.

The dissenting opinion, cited once again with approval, stated that "When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of public record, the anxiety and uncertainty that supports . . . support Miranda's finding of inherent coercion simply ceases to exist. When custody is . . . not related to any pending unresolved matter, it seems to me,"; that is the dissenting justice in Alaska "that there is little cause for concern that a police officer will appear to control the suspect's fate."

It went on to say, "If it is safe to say under the existing case law that a sentenced prisoner cannot automatically be deemed to be in continuing *Miranda* custody, then it is equally safe to say that a sentenced prisoner who invokes the right to counsel upon being interrogated under circumstances amounting to *Miranda* custody and is thereafter returned to normal sentenced-prison status should not automatically be deemed to be in continuous custody under *Edwards*. Once returned to the ordinary routine of other sentenced prisoners - without any vestige of inherently coercive circumstances incidental to custodial interrogation - the prisoner should be treated, for *Edwards* purposes, in the same manner as any person who has been arrested, questioned in custody, and

released."

Once again, various other sources were pointed to in support of this, including a case, *U.S. versus Arrington*, which is a federal case. There are various other cases. One of which is *United States versus Hall*. In *Hall* the . . . that's a federal case, as well, the Sixth Circuit held that three months that transpired after the original requesting of counsel and the re-interrogation was enough to break the in custody . . . the period of time that the defendant is in custody as the term is used in the context of *Edwards* and *Roberson*.

Once again, here we have a case in which there is two years and seven months and the Court of Special Appeals found that the five year period of time that was elapsed between the original assertion of right to counsel . . . a right to counsel and the re-interrogation broke that chain of events for *Miranda* purposes, for Fifth Amendment and Fourteenth Amendment purposes and therefore the statements made after the re-interrogation was not inadmissible as a result of *Edwards*.

Specifically, the Court focused on whether there was an inherently coercive nature of confinement at the time of the re-interrogation. And the Court of Special Appeals found that in the *Clark* case that, "There is little in the Court's cases to suggest that the great potential for coercion exists shortly after arrest . . . I'm sorry, existing shortly after arrestor arguably at the . . . any time pre-trial, also continues to exist for every moment of all the subsequent years of the defendant's incarceration."

"There is no good basis for extending this fiction to insulate some suspects from questioning for years or even their entire life based on a single request."

The Court went on to hold, also, that, "Release into the general prison population as a sentenced prisoner can have the same effect ending both Miranda custody and the question-proof status conferred by an earlier invocation of a right to counsel."

Essentially, the Court was saying that once a defendant is released into the general population, after he is a sentenced prisoner, which Mr. Shatzer was in this case, that the *Miranda* type of custody essentially dissipates, particularly after a significant amount of time transpires.

The Court also found that adopting the rule suggesting that the defendant should be interview proof for a long period of time would produce absurd results. "It would," I'm quoting here, "Create a class of prisoners who are forever question proof even though law enforcement officers would have no way of knowing that the prisoner enjoys question-proof status."

The Court of Special Appeals also recognized that the other cases dealt with very short periods of time between the original assertion of right to counsel and re-interrogation. Recognizing that the evil to be avoided was the badgering by police officers, the coercive nature of re-interrogation shortly thereafter and the effect of attempting to have defendants waive their rights . . . the *Miranda* rights by that re-

interrogation after the assertion of one's right to have an attorney.

And, specifically, as it relates to this case, the Court of Appeals said that, "Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to this rule is not required."

So, the Court found that because of the time period that elapsed; in that case it was five years; but once again, it's cited to other cases where much shorter periods of time between the original interrogation and the re-interrogation would not be conducive to in custody *Miranda* type of interrogation, if re-interrogation took place. The Court looked at the time period between the right to counsel was requested and the re-interrogation and found that the trial court did not violate the *Edwards* rule in denying the motion to suppress the later statement given to the police officers.

This case is very similar to the case at hand. Like I said, we're dealing with a case in *Clark* where there was a five year period. Here we have two and one half . . . two and . . . a little bit more than two and a half years gap between the original interrogation, the original questioning by Detective Blankenship, the assertion of his right to counsel andthe re-interrogation by Detective Hoover where he waived his right to counsel.

He was, from what I understand, in custody throughout that entire period of time. He was placed back into general population from what I can glean from everything that's been testified to. When Detective Hoover went to see him there were no threats made. He was not armed. There were no handcuffs placed upon the defendant. He was in a room, comfortable in all respects. Did not request water, food. Did not appear to be having trouble understanding anything that was happening. And freely and voluntarily waived his right to counsel, waived his right to remain silent. There were no threats of any kind. In looking at the totality of the circumstances his statement to Detective Hoover and later on to Detective Schultz and once again to Detective Hoover was completely voluntarily in accordance with state law.

There was a break in custody for *Miranda* purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edward*; that is to not question the defendant without having an attorney present once he asserted those rights; did not apply. So, I would find that in this case because of the significant length of time, the fact the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, the fact that Detective Hoover did not know that the defendant had asserted his rights to have an attorney back in August of 2003, all this leads the Court to find that the defendant's motion to suppress the statements that he made to Detective Hoover and Detective Schultz in March of

2006 must be denied.

The motion to suppress will be denied.

MR. CREEDEN: Thank you, your Honor.

THE COURT: Thank you.

MS. CIRINCION: Thank you, your Honor.

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I HEREBY CERTIFY, that the aforegoing is a true and accurate transcription of the proceedings in State of Maryland versus Michael Blaine Shatzer, Criminal Trials 21-K-06-37799 in the Circuit Court for Washington County, Maryland, held on September 14, 2006.

Christine B. Ellis, Court Reporter

OPPOSITION BRIEF

NO. 08-680

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

STATE OF MARYLAND,

Petitioner

v.

MICHAEL BLAINE SHATZER, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the prohibition against initiating further interrogation once a suspect has invoked the right to counsel as set forth in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), fully applicable to Mr. Shatzer, who was questioned twice about the same underlying investigation while in continuous custody, separated by a period of two years and seven months, and who was not provided with counsel, did not enter a plea, and did not receive a sentence in the interim?

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NO. 08-680

IN THE
SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 2008

STATE OF MARYLAND,

Petitioner

v.

MICHAEL BLAINE SHATZER, SR.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Michael Blaine Shatzer, Sr., by counsel, Nancy S. Forster, Public Defender of Maryland, and Celia Anderson Davis, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the State of Maryland because there has been no showing that the issue presented is an important question of federal law that merits consideration by this Court.

REASONS FOR DENYING THE WRIT

The State of Maryland, Petitioner in this case, asks this Court to re-examine its ruling in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), to determine whether a purported break in custody or the passage of two years and seven months between the time Mr. Shatzer was first questioned by a police detective and requested counsel and the time another detective re-interrogated him without providing counsel should terminate the protections of *Edwards*. This Court should decline review. First, this case does not involve a break in custody such as has been recognized by some courts as terminating the protections of *Edwards*. Second, the "bright-line" characteristics of the *Edwards* rule should be preserved to continue to provide clear guidance to those who conduct custodial interrogation, conserve judicial resources, and ensure that statements made by suspects while in police custody are not coerced. Third, Petitioner does not suggest a feasible alternative to the rule in *Edwards*.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" In *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 723 (1966), this Court ruled that, when a suspect in custody asks for an attorney, interrogation "must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."

In *Edwards v. Arizona*, 451 U.S. at 484-85, 101 S. Ct. at 1885, 68 L. Ed. 2d at 386, this Court held that a suspect, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." The rule in *Edwards* is a procedural safeguard, in addition to those found in *Miranda*, to ensure that the guarantee of the Fifth Amendment is honored: "It is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to interrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* In Mr. Shatzer's case, the Maryland Court of Appeals correctly concluded that the rule of *Edwards* was applicable to bar the use of a statement Mr. Shatzer made to police detectives two years and seven months after he first requested the assistance of an attorney, where counsel was not made available to him, there was no break in custody, and the renewed interrogation involved the same allegation.

I. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER A BREAK IN CUSTODY CONSTITUTES AN EXCEPTION TO THE RULE SET FORTH IN *EDWARDS*.

The Maryland Court of Appeals correctly recognized that there was no break in custody in Mr. Shatzer's case because he was incarcerated in continuous government custody (App. 28a-29a)[1], and because the "two interrogations were

[1] "App." refers to the Appendix to the Petition for Writ of Certiorari.

separated *solely* by time; they involved the same underlying investigation and he did not enter a plea nor was he sentenced in the interim." (App. 34a).

The cases holding that a break in custody can create an exception to the rule in *Edwards* fall into three categories. First, under the reasoning of the United States Court of Appeals for the Eleventh Circuit in *Dunkins v. Thigpen*, 854 F. 2d 394, 397 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989): "If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar the admission of any subsequent statements." *See also People v. Trujillo*, 773 P.2d 1086, 1092 (Colo. 1989)(en banc)(release from custody ends the need for the *Edwards* rule); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S. Ct. 3569, 77 L. Ed. 2d 1410 (1983)(suspect who left the police station and had the opportunity to contact a lawyer is not in continuous custody).

Second, some courts have recognized that an intervening conviction may constitute a break in custody. For example, in *Isaacs v. Head*, 300 F.3d 1232, 1263 (11th Cir. 2002), the United States Court of Appeals for the Eleventh Circuit recognized a break in custody under circumstances in which a suspect was questioned and invoked his right to counsel in 1973, and was convicted and sentenced to a term of incarceration in 1974. After making two attempts to escape from prison in 1980 and 1985, Isaacs was questioned by a law-enforcement officer and made statements. *Id.* at 1257-58. The statements were introduced by

prosecutors at a sentencing hearing following re-trial to show that Isaacs intended to escape from prison. *Id.* at 1258. The Court recognized that "incarceration following a conviction constitutes a break in *Miranda* custody, thereby ending the *Edwards* protections." *Id.* at 1267.

Third, other courts have determined that a suspect who has an opportunity to consult with counsel may be deemed to have had a break in custody. In *United States v. Arrington*, 215 F.3d 855, 856 (8th Cir. 2000), the suspect was arrested, advised of his *Miranda* rights, and requested counsel. While represented by counsel, he entered a guilty plea to one charge and began serving a prison sentence. *Id.* While incarcerated, he was arrested for a federal offense, was questioned by a federal agent, and made a statement. *Id.* The United States Court of Appeals for the Eighth Circuit held that *Edwards* did not apply "where, as here, the accused has entered a guilty plea and has begun serving his sentence." *Id.* at 856.

Even if this Court were to recognize that a break in custody following release into the community, a conviction, or consultation with an attorney could relax the *Edwards* rule, the facts in Mr. Shatzer's case are such that an exception would not apply to him. He was not released after he was questioned and invoked his right to counsel on August 7, 2003; he remained incarcerated in connection with an unrelated offense. (App. 2a). He was not provided with an attorney to assist him with the investigation conducted initially by Detective Blankenship. (App. 3a). Criminal charges were not filed against him at that time. *Id.* Unlike in

Clark v. State, 781 A.2d 913, 921 (Md. Ct. Spec. App. 2001), *cert. denied*, 796 A.2d 695 (2002), and *United States v. Green*, 592 A.2d 985, 986 (D.C. 1991), *cert. dismissed*, 504 U.S. 545, 113 S. Ct. 1835, 123 L. Ed. 2d 260 (1993), in this case, there was no intervening conviction involving consultation with an attorney. Mr. Shatzer did not initiate communication with the police after he requested an attorney. (App. 3a-4a). Detective Hoover resumed interrogation on March 2, 2006. *Id.* Mr. Shatzer seemed surprised, stating that he thought the investigation had been concluded. (App. 4a).

As in *Edwards*, 451 U.S. at 484-85, 101 S. Ct. at 1885, 68 L. Ed. 2d at 386, *Arizona v. Roberson*, 486 U.S. 675, 683, 108 S. Ct. 2093, 2099, 100 L. Ed. 2d 704, 715 (1988), and *Minnick v. Mississippi*, 498 U.S. 146, 154, 111 S. Ct. 486, 491, 112 L. Ed. 2d 489, 498 (1990), Mr. Shatzer was in the same position with respect to the police investigators when he first spoke with Detective Blankenship on April 7, 2003, and said that he would not talk about the case without having an attorney present, as he was when Detective Hoover resumed questioning on March 2, 2006, and when Detective Schultz did so on March 7, 2006: he was the subject of a criminal investigation; he had not been charged; he had not been provided with an attorney, and had not consulted with an attorney in connection with any other case. Nothing about Mr. Shatzer's circumstances had changed such that his original choice to deal with police investigators only through counsel should no longer have been honored. The Maryland Court of Appeals correctly determined that there was no break in custody in this case. (App. 41a).

II. THE *EDWARDS* RULE SHOULD NOT BE RELAXED MERELY BY THE PASSAGE OF TIME.

Prior to the ruling in *Edwards*, this Court favored an individual, case-by-case analysis of whether a waiver of the right to counsel by a person who had previously invoked it was knowing, voluntary, and intelligent. *Solem v. Stumes*, 465 U.S. 638, 647, 104 S. Ct. 1338, 1343-44, 79 L. Ed. 2d 579, 589 (1984). Since *Edwards* was decided, this Court has declined to recognize exceptions to the rule. In *Arizona v. Roberson*, 486 U.S. at 682, 108 S. Ct. at 2098, 100 L. Ed. 2d at 714, this Court agreed with the Arizona Court of Appeals that a statement made by Roberson about a crime different from the one for which he was in custody must be suppressed. If a suspect invoked his right to counsel in the first interrogation, then a law enforcement officer may not initiate a second interrogation unless the suspect has another opportunity to speak with counsel or is in the presence of counsel. *Id.* A statement made during a second interrogation could only be used if the suspect initiated contact with the police. *Id.* It is presumed that if the suspect did not want to speak the first time and stayed in custody until the second time, he still wants to speak to counsel before making a statement; to presume anything else would violate the prohibition against self-incrimination. *Id.* 486 U.S. at 683, 108 S. Ct. at 2099, 100 L. Ed. 2d at 715.

In *Minnick v. Mississippi*, 498 U.S. at 154, 111 S. Ct. at 491, 112 L. Ed. 2d at 498, this Court declined "to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation

resumes." The dissenting Justices expressed the view that *Edwards* should not apply "when a criminal suspect has actually consulted with his attorney." *Id.* 498 U.S. at 156, 111 S. Ct. at 493, 112 L. Ed. 2d at 500. They noted: "In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades." *Id.* 498 U.S. at 163, 111 S. Ct. at 496, 112 L. Ed. 2d at 504. In *United States v. Green*, 592 A.2d at 985, the suspect was arrested for a drug offense; he filled out an advice of rights form, answering "No" to the question whether he was willing to answer questions without an attorney present. The District of Columbia Court of Appeals held that police-initiated questioning five months after the suspect first invoked his right to counsel, even after he consulted with an attorney and pled guilty in the case for which he was originally detained, cannot justify a departure from *Edwards*. *Id.* at 989-90.

Since *Edwards* was decided, this Court has not retreated from its clear holding. *See Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488, 495 (1984)(per curiam)("*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel."); *Solem v. Stumes*, 465 U.S. at 646, 104 S. Ct. at 1343, 79 L. Ed. 2d at 589 ("*Edwards* established a bright-line rule to safeguard pre-existing rights."); *Michigan v. Jackson*, 475 U.S. 625, 634, 106 S. Ct. 1404, 1410, 89 L. Ed. 2d 631, 641 (1986)("one of the characteristics of *Edwards* is its clear, 'bright-line" quality."). *See also* Wayne R. LaFave, *Criminal Procedure*, Sec. 6.9(f) (3d ed. 2007)("*Edwards* is best viewed as

a *per se* rule proscribing any interrogation of a person held in custody who has invoked his right to counsel absent the individual's subsequent initiation of conversation.")(footnotes omitted).

One reason for preserving the *Edwards* rule with its bright-line quality, even after a lapse of time, is the difficulty in formulating a principled alternative. There is no logical point on a time line at which the right to counsel should diminish or expire. This point became clear during the oral argument in this Court in *United States v. Green*, No. 91-1521, 1992 WL 687878, at *17-18 (Nov. 30, 1992), when counsel for the Petitioner, the United States, argued that the passage of three months, two months, and one month between interrogations could excuse compliance with *Edwards*, but "2 days is probably not enough. Now, it isn't a bright line." There are countless variations in the circumstances of custody and the time periods over which a suspect in custody may be questioned, for example, one day (*Edwards*), three days (*Roberson*, *Minnick*), two years and seven months (Mr. Shatzer's case), or five years (*Clark v. State*). Petitioner, citing the dissenting opinion of the Maryland Court of Appeals in Mr. Shatzer's case, seems to advocate a return to an examination of voluntariness on a case-by-case basis. (Petition for Writ of Certiorari at 25-26).

It is not correct to assume, as Petitioner does, that coercive pressures lessen over time for people who are incarcerated. (Petition for Writ of Certiorari at 20). The isolation of a prison inmate may increase the coercive pressures felt, especially if the person is not free to refuse contact with law enforcement officers

who enter the correctional institution to speak with him or her. The Maryland Court of Appeals made note of this. (App. 41a). Other than by stating: "[a]fter a substantial period of time, however, the presumption that the defendant wishes to proceed only in the presence of counsel is not reasonable," Petitioner offers no concrete suggestion for determining how long the protections of *Edwards* should remain in effect. (Petition for Writ of Certiorari at 21).

According to Petitioner: "The concern and goal of *Edwards* is to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." (Petition for Writ of Certiorari at 19-20). This is one goal of the rule of *Edwards*, but it is not the only one. As this Court recognized in *Minnick v. Mississippi*, 498 U.S. at 151, 111 S. Ct. at 489-90, 112 L. Ed. 2d at 496, a clear rule that all questioning must cease when a suspect in police custody asks for counsel - unless counsel is provided or the accused initiates further contact with the police – (1) provides clear guidance for those who conduct custodial interrogations, (2) frees trial courts from having to make voluntariness determinations on a case-by-case basis, and (3) helps to ensure that statements made by individuals in custody are free of coercion.

There is a fundamental difference between a person in police custody who says: "I don't want to talk to you," and a person who says: "I will not talk about this case without having an attorney present." The second statement indicates that the accused wants help in dealing with the agents of the government. Petitioner states that, in Mr. Shatzer's case, "the police have honored a suspect's request for

counsel for a significant period of time[.]" (Petition for Writ of Certiorari at 20). Also, the dissenting judges of the Maryland Court of Appeals in *Shatzer v. State*, declare that "Shatzer previously exercised his right to speak with an attorney." (App. 60a n. 18). Both assertions are incorrect. Mr. Shatzer's request for counsel was never honored; access to an attorney was never provided to Mr. Shatzer before he was questioned for the second and third times. (App. 3a-4a). The Maryland Court of Appeals correctly found that, after Mr. Shatzer stated that he would not talk about the case without having an attorney present, questioning him twice in 2006 without providing access to counsel violated the procedural safeguards of *Miranda* and *Edwards*. (App. 42a-44a).

A prior request for counsel prohibits further interrogation. Even if it did not, this Court should recognize, as other courts have, that a police officer who is resuming an investigation has a duty to determine, before questioning a suspect, if that person has previously requested an attorney. *United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied*, 479 U.S. 831, 107 S. Ct. 117, 93 L. Ed. 2d 64 (1986). *See also United States v. Webb*, 755 F.2d 382, 389 (5th Cir. 1985)(even an unintentional violation of *Edwards* must result in exclusion of a statement to police); *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983)("once a suspect has invoked the right to counsel, knowledge of that right is imputed to all law enforcement officers who subsequently deal with the suspect."); *McCarthy v. State*, 65 S.W.3d 47, 52 (Tex. Crim. App. 2001)("courts impute

knowledge of the invocation of any *Miranda* rights to all representatives of the State.").

Here, Detective Blankenship had preserved the original "Waiver of Miranda Rights" form executed on August 7, 2003. (App. 3a). He prepared a report which stated: "When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present." (Transcript of Proceedings, Suppression, August 29, 2006 at 14). Detective Hoover was aware of the prior investigation before he met Mr. Shatzer. *Id.* Mr. Shatzer told him that he thought the investigation had been closed. (App. 4a). Under these circumstances, Detective Hoover was bound to take the steps of speaking with Detective Blankenship or looking in the case file to find out what happened during the prior interview before questioning Mr. Shatzer again.

Mr. Shatzer's case traces back to *Miranda*, in which two of this Court's concerns were: "the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime," and providing "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda v. Arizona*, 384 U.S. at 439, 442, 86 S. Ct. at 1610-11, 16 L. Ed. 2d at 704-05. "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. at 151, 111 S. Ct. at 489-90, 112 L. Ed. 2d at 496. This clarity and certainty should be preserved.

III. THE *EDWARDS* RULE IS NOT DESIGNED TO FRUSTRATE LAW ENFORCEMENT EFFORTS.

Petitioner contends that the result of applying the *Edwards* rule in Mr. Shatzer's case "discourages police from investigating new leads and impedes resolution of dormant or 'cold cases.'" (Petition for Writ of Certiorari at 25). There are costs associated with a bright-line rule. As with *Miranda*, some reliable evidence will be excluded from evidence as a consequence of violating procedural safeguards. Strict adherence to the *Edwards* rule will result in some "question-proof" suspects. *See* Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 951 (1997)("some inmates are rendered question-proof - - unapproachable for any questioning - - based on an invocation of the right to counsel long ago in regard to charges resolved by the suspect's sentence to a period of incarceration."). But this is the result of honoring the constitutional mandate prohibiting self-incrimination, which is protected by the right to counsel. *Fare v. Michael C.*, 442 U. S. 707, 719, 99 S. Ct. 2650, 2668-69, 61 L. Ed. 2d 197, 208 (1979)("The rule in *Miranda*, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.").

The rule in *Edwards* strikes an appropriate balance between the need to protect an individual's right to be free from compelled self-incrimination and the efforts of law enforcement officers. In *Davis v. United States*, 512 U.S. 452, 460-

61, 114 S. Ct. 2350, 2355-56, 129 L. Ed. 2d 362, 372 (1994), this Court stated: "The *Edwards* rule - questioning must cease if the suspect asks for a lawyer – provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." Enforcing the *Edwards* rule does not foreclose the use of all statements made to law enforcement officers. If a lawyer is provided to a suspect in custody, or if that person initiates communication with a police officer, then a resulting statement may be admissible. *Edwards v. Arizona*, 451 U. S. at 485, 101 S. Ct. at 1885, 68 L. Ed. 2d at 387. The right to seek assistance from an attorney while undergoing custodial interrogation should not disappear over time and should not be eroded by exceptions created on a case-by-case basis.

CONCLUSION

For the foregoing reasons, Mr. Shatzer respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Nancy S. Forster
Public Defender

Celia Anderson Davis
Assistant Public Defender

Counsel for Respondent

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JOINT APPENDIX

125 (3)

Supreme Court, U.S.
FILED
APR 13 2009
OFFICE OF THE CLERK

No. 08-680

IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 24, 2008
CERTIORARI GRANTED JANUARY 26, 2009

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Reported opinion of the Court of Appeals,
Michael Blaine Shatzer, Sr. v. State of Maryland,
403 Md. 304, 941 A.2d 1104 (2008) . . . . JA 83-166

The following opinion, decision, judgment, and order has been omitted in printing this joint appendix because it appears on the following pages in the appendix to the Petition for Certiorari:

Order granting writ of certiorari from the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland*, Court of Special Appeals No. 2823, Sept. Term, 2006, filed February 13, 2008 ..... 82a-83a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 16, 2006 — Four-count criminal information filed, charging second degree sexual offense, child abuse by parent, second degree assault, and contributing to conditions rendering a child in need of assistance.

June 20, 2006 — Defendant's motions pursuant to Maryland Rule 4-252, including motion to suppress, filed.

August 29, 2006 — Defendant's motion to suppress heard in open court proceeding.

September 14, 2006 — Bench opinion denying motion to suppress rendered in open court proceeding.

September 21, 2006 — Defendant found guilty of child abuse in trial on agreed statement of facts.

December 21, 2006 — Defendant sentenced to consecutive term of 15 years on child abuse count, 10 years suspended with probation for 5 years.

December 28, 2006 — Defendant's Order of Appeal and Indigency Notice filed.

February 2, 2009 -Mandate of Court of Appeals filed reflecting August 26, 2008 judgment of the Court of Appeals.

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND*

vs. * CRIMINAL TRIAL NO. 21-K-06-37799

MICHAEL BLAINE SHATZER, SR. *

*

****

TRANSCRIPT OF PROCEEDINGS (Suppression)
Circuit Court - Courtroom No. 1
Hagerstown, Maryland
August 29, 2006

The above entitled matter came on for hearing

Before:

The Honorable John H. McDowell, Judge

Appearances:

Gina Cirincion, Assistant State's Attorney,
on behalf of the State

Carl Creedon, Assigned Public Defender,
on behalf of the Defendant

Transcribed from electronic recording by:
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Circuit Court for Washington County, Maryland
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August 29, 2006

(Whereupon this matter commenced at 1:28 p.m.)

MS. CIRINCION: Your Honor, the next matter is a suppression hearing, the matter of Michael Shatzer, 3-7-7-9-9.

THE COURT: Michael Shatzer.

MS. CIRINCION: Carl, I've called it. I called the case.

MR. CREEDEN: Oh.

MS. CIRINCION: I think they may be getting him. I hope.

THE COURT: Are they getting Shatzer?

SERGEANT MUMMERT: Yes, Your Honor. They are.

MR. CREEDEN: It seems to...., now that I get discovery, additional discovery, it would be an *Edwards versus Arizona* issue.

MS. CIRINCION: Well the problem is that was three years ago.

THE COURT: Do you want to talk to your client a little bit or something?

MR. CREEDEN: No. I should explain for everyone's

benefit, this was Mr. Connell's case, and of course he's no longer with us. So I actually met Mr. Shatzer the 25th for the first time. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CREEDEN: Carl Creeden representing Michael Shatzer here for a Motion to Suppress. Your Honor, the issue now that I've met with Mr. Shatzer and received additional discovery today from the State, I received something about the polygraph, which is not....., I don't think that's an issue. I don't think the State intends to introduce the polygraph at trial.

MS. CIRINCION: No.

MR. CREEDEN: So the issue is quite frankly Mr. Shatzer was interviewed by Lieutenant Blankenship back in 2003, when he was in prison about, I believe, the same incident, requested an attorney at that time, was then re-interviewed this year by different officers, read him *Miranda* rights and made two statements. And the issue as I see it is whether *Edwards versus Arizona* prohibits the use of his statements.

THE COURT: Okay.

MR. CREEDEN: I think that pretty much....., that for the most part is the issue as I see it.

MS. CIRINCION: Your Honor, the State will present evidence that Mr. Shatzer has repeatedly had his rights per the *Miranda* decision read to him, that he was waived them and has spoken to a number of

police officers. In 2003, and actually, this was news to me, Mr. Creeden notified me after meeting with Mr. Shatzer on Friday I believe, I got the call Monday, that Detective Blankenship had in fact conducted an interview back in 2003. I immediately called Detective Blankenship. He pulled those records and faxed them to me, and I faxed them to Mr. Creeden and a hard copy was put in the mail also, which they may be what he received today, but I did fax everything yesterday. Our contention will be that in the four years that have passed since the last time the Defendant was interviewed, he was approached by Detective Hoover, was again read his rights per *Miranda* and waived those. Subsequent to that he had asked for a polygraph or agreed to take one. So when he met with Shawn Schultz several days later, he once again was read his rights per *Miranda* and waived them. So we would maintain that while he may...., while he did ask for an attorney and Detective Blankenship did in fact terminate that interview, when this new investigation arose, and in fact it is a new investigation, the...., he was re-Mirandized and did give a statement to Detective Hoover fully aware of what all of his rights were and instead...., instead of invoking any of those rights, he gave a statement.

THE COURT: All right.

MR. CREEDEN: It was three years, 2003, not four, three years.

THE COURT: Anything preliminarily?

MS. CIRINCION: No.

THE COURT: Okay, Ms. Cirincion.

MS. CIRINCION: Call Detective Blankenship.

THE COURT: Detective Blankenship.

TESTIMONY OF DETECTIVE SHANE BLANKENSHIP

DETECTIVE SHANE BLANKENSHIP, a witness, produced on call of the State, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Ms. Cirincion:

Q: Would you please state your name, rank, and duty assignment?

A: My name is Shane Blankenship. I work for the Hagerstown Police Department. My rank is Detective, and I'm currently assigned to the Criminal Investigation Division.

Q: Within the Criminal Investigation Division, do you have a special assignment?

A: Uh, I currently do, yes, and that's working at the Child Advocacy Center.

Q: And how long have you held that position?

A: Since about the middle of 2002 is when I was

first assigned over there.

Q: And you've been assigned over there ever since?

A: Yes.

Q: Okay. Now I'm going to call your attention to July of 2003. Did you receive a report or rather a....., a referral for a Michael Shatzer, Jr.?

A: Yes, I did.

Q: And how did you come to receive that?

A: That was through the Child Advocacy Center, specifically through Brenda Lohman who is a social worker also assigned to the center.

Q: And did you interview the child in that case?

A: Uh, yeah, we did. We interviewed the child together. And what he explained was he described an incident that occurred previously between he and his father. This incident happened in the living room of their home at the time, which would have been ....

THE COURT: Is the father the Defendant?

A: I'm sorry?

THE COURT: Is the father the Defendant?

A: Yes, I apologize, Your Honor. The...., his father is Michael Blaine Shatzer, Sr., seated at the defense

table. Anyway, this incident happened in the living room of the home, and he described that his father pulled his pants down, exposed his penis, apparently put milk on his penis and told him to lick his worm, or suck his worm, or something to that effect. And that time he didn't say he actually did that, he just described the exposure and that was as far as it went by his description.

Q: After...., after the interview took place, what action did you take?

A: Uh, well on August on 7, I made contact with Michael Shatzer, Sr., at the Maryland Correctional Institute, where he was housed for a separate offense. I had to arrange that interview previously. So anyway that contact was made on August 7, and I sat down with him, and before I asked him any questions, I read to him the contents from a standard Hagerstown Police Department *Miranda* Waiver Rights form. And he did sign the form, he initialed it in the correct places, he indicated that he understood the contents of the form. It was at that point that I told him why I was there and why I needed to talk to him. He seemed to be a little confused at that point, and he explained to me that he actually thought that I was an attorney and that I was there to talk to him about his...., his...., the case, why he was in there originally. I explained to him, "No, I'm sorry, I'm a police detective and, you know, I'm not an attorney hereto assist you". And at that point, he refused to give a statement. So I just terminated the interview at that point.

THE COURT: And this was August 7th, '03?

A: Uh, yes, it was.

THE COURT: And he was being house on another charge. Do you know what that charge was?

A: Uh, I believe that was a sex offense charge.

THE COURT: A different sex offense charge?

A: It was a different sex offense charge.

Q: In fact it was a different victim, correct?

A: Yes, it was a different victim.

Q: Detective, how were you dressed when you went to MCI that day?

A: I...., you know, I can't recall how I was dressed that particular day, but I wouldn't have had a weapon on because I was inside the prison.

Q: Okay, but you were in plain clothes?

A. I would have been in plain clothes, yes, not in uniform.

Q: And so your weapon would have been checked at the door?

A: Yes, absolutely.

Q: And do you recall specifically telling him that you are a police officer.

A: Yes.

Q: And was that before he executed the *Miranda* statement, waiver?

A: Um, yeah. I would have introduced...., I did introduce myself beforehand and then read the...., waiver form. And after that, when I said he seemed a little confused, I too was confused. I didn't realize...., I didn't see how he could have made the mistake that I was an attorney when I had identified myself as a police officer. In fact, I had identified myself as a detective. So but regardless, he did not make a statement. I didn't question him any further when he said that he didn't want to make a statement and the interview was terminated.

Q: So after he signed *Miranda* then he expressed confusion....

A: Yes.

Q: ....and then he refused to make a statement?

A: Yes, that's correct.

Q: And included in his refusal to make a statement was the fact that he would want an attorney present?

A: Yes, that's right.

Q: Now did you give...., did you use the standard *Miranda* waiver form that....

A: Yes.

Q: ....the Hagerstown Police Department uses?

A: Yeah, in fact I have the...., the original copy that he signed is...., I have in possession here.

Q: Well for purposes of this hearing, I'm going to use the photocopy.

A: Sure.

Q: This has been marked as State's Exhibit One for identification purposes.

A: Okay.

Q: Can you identify that please?

(State's Exhibit No. 1
Marked for Identification)

A: Yeah, that is a...., this is actually a faxed copy of the original. It's a direct copy, it's just faxed.

Q: And what is it?

A: This is the form. This is a Hagerstown Police Department Waiver of *Miranda* Rights form. It's dated August 7, 2003. The time was 2:03 p.m. My signature is on this form as well as that of Mr. Shatzer. And I saw him sign the form and initial it.

Q: And you remember him signing it?

A: Yes.

Q: As the person sitting in the courtroom today?

A: Yes, the same person.

Q: Move to admit State's One.

MR. CREEDEN: No objection.

THE COURT: Be admitted. (State's Exhibit No. 1 Admitted Into Evidence)

Q: What does it say in capital letters across the top of this page?

A: It does say, "Hagerstown Police Department Waiver of *Miranda* Rights".

THE COURT: When you saw him in 2003 and you explained to him why you were there, what did you say? Did you tell him that you were there to investigate a particular incident?

A: Your Honor, I can't remember verbatim what I said. But I could tell you that normally I don't play games with people. I tell them exactly who I am and exactly why I'm there. I'm not into subterfuge. So I'm sure that I told him that I was there to investigate an incident involving his son, you know. And I'm sure I would have told him the nature of that offense.

Q: Now, Detective, after you terminated the interview, did you have any further contact with Mr.

Shatzer, Sr.?

A: Uh, there was for an appeal hearing for a DSS disposition for sexual abuse.

Q: Did you interrogate him at that time?

A: Uh, no.

Q: Did you have any conversation with him at that time?

A: Um, I believe I said hello and gave him a smile and that was probably about the extent of my conversation with him.

Q: Do you recall when that would have been?

A: Yeah, I have the original Summons for the date. That was December 8th, 2004, 1:00 p.m. That would have been at the MCI facility.

Q: And this was a DSS appeal?

A: That was a DSS appeal hearing.

Q: Okay. Who else was present at that, if you recall?

A Uh, Brenda Lohman was there, and I don't see his name on the paper here, but it was Michael Wilson was the attorney representing DSS. And I don't believe Mr Shatzer had any representation at that point.

Q: Detective, when did you learn that there was a..., a new investigation into Michael, Jr.'s, allegations?

A: That would have been some weeks ago is when I first heard about that.

Q: So when Detective Hoover was assigned this case, were you aware of it?

A: Yeah, he actually told me about it. I came into work one morning, I can't remember exactly what that was, but he told me that he had this particular case.

Q: Okay. Had he already interviewed Mr. Shatzer?

A: At that point, I don't think so. I don't think he..., I think he just told me that he had just gotten the case and what the....uh, what the general facts were. (Coughing) ..., excuse me.

Q: And those facts were familiar to you?

A: Yeah, they were.

Q: Now is there...., is there some reason, if you know, that this case was given to Detective Hoover when you were the original investigating officer?

A: Yeah, because I was..., I believe I was on vacation at the time that this came in. So.... (coughing)...., excuse me, he's one of the designated detectives who handles my case load when I'm not there.

Q: Okay. So it was common procedure if you were out that a new CPS or Child Protective Services investigation would go to a back-up investigator?

A: Right. And Detective Hoover's had experience in those types of investigations in the past, so that's why he gets some of those investigations.

Q: But you don't recall discussing specifics with Detective Hoover?

A: Uh, no, I don't think I discussed it with him in depth. I just told him that I knew..., I had had the case before and was familiar with it. And I don't think there was much conversation about it after that.

Q: Do you recall telling Detective Hoover that Mr. Shatzer asked for a lawyer and the in it..., and the original 2003 interview was terminated?

A: I can't remember. I may have. I can't remember that specifically.

Q: Did you remember that at the time that there was..., when was..., when was the last time you even thought about this case?

A: Uh...., probably when Detective Hoover told me about his current investigation.

Q: Okay. But you don't recall if you said anything to him about Mr. Shatzer terminating the interview?

A: No, I don't, no.

Q: Okay. Thank you. I have no other questions.

END DIRECT EXAMINATION

THE COURT: Mr. Creeden.

CROSS-EXAMINATION

By Mr. Creeden:

Q: Yes. When you were investigating this case in 2003, was Brenda Lohman involved in investigating it?

A: She was involved, yes. She was the CPS case worker assigned, and she was involved with the interview with Michael, Jr.

Q: Okay. And was she present with you in August of '03, when you went to MCI to interview Mr. Shatzer?

A: No, she was not. I was by myself.

Q: She was not. It was just you alone?

A: Yes.

Q: And I have received actually yesterday at..., in the afternoon, a copy of your report from 2003. Do you have that?

A: I do, yes.

Q: Okay. Now calling your attention to page two of

the supplement report....

A: Okay.

Q: ....I draw your attention to that report. It seems to indicate that, and I quote, "When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present."

A: Yes.

Q: So he..., he did not want to discuss it without having an attorney present, correct?

A: Right, yeah.

Q: And you said, according to your report, you then said, "I asked him to contact me once he obtained an attorney".

A: Right.

Q: And you ended contact.

A: Yes.

Q: You then said that in December of '04, there was a hearing at MCI, is that correct?

A: Yes, that's correct.

Q: And you...., are you aware of the current charges that bring us to court today? I mean are you aware of

the charges against Mr. Shatzer involving his son?

A: Uh, Counselor, to be candid with you, I'm not sure exactly what he's charged with now. I believe it is sex offenses, but I don't know the specifics.

Q: And you're saying that you were on vacation so Detective Hoover handled this recent case?

A: 1 believe I was on vacation. I'm not sure exactly when he was assigned the case. But I just remember coming back to work and him telling me about this.

Q: So I....

A: If I had been at work, it would have been assigned to me.

Q: It would have been assigned to you.

A: It would have been, yes.

Q: Okay. Are you aware whether or not you've shared your old report with Detective Hoover?

A: Uh, I don't think Detective Hoover has actually seen my original case file unless he has researched that independently, but yesterday was the first time I pulled this out since I had closed the case back in 2003.

Q: And Mr. Shatzer after being read his rights and signing the waiver form, after that is when he said he didn't want to talk without his attorney present?

A: Right. Well I told him about the nature of the investigation and that's when he seemed confused. He said that he thought I was an attorney. I had explained, no, I wasn't, I was a detective, and then I, uh, attempted to continue with the questioning, and he said, "No, I...., you know, I don't want to talk. I really would rather have an attorney here." I said, "Fine".

Q: No further questions.

END CROSS-EXAMINATION

THE COURT: Ms. Cirincion?

MS. CIRINCION: No re-direct.

THE COURT: Thank you, sir. You may step down.

A: Thank you.

END TESTIMONY OF DETECTIVE
SHANE BLANKENSHIP

MS. CIRINCION: Call Detective Hoover.

THE COURT: Detective Hoover.

TESTIMONY OF DETECTIVE
PAUL STEVEN HOOVER

DETECTIVE PAUL STEVEN HOOVER, a witness, produced on call of the State, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Ms. Cirincion:

Q: Please state your name, rank, and duty assignment.

A: Paul Steven Hoover. My rank is Detective. I'm currently assigned to the Criminal Investigation Division with Hagerstown City Police Department.

Q: And were you assigned...., um, was that your assignment in 2006? All year?

A: Yes ma'am.

Q: Did you receive a referral from the Child Protective Services regarding a Michael Shatzer, Jr.?

A: I did.

Q: And how did you receive that referral?

A: On February 28th, 2006, Brenda Lohman had contacted Sergeant Kifer, who is my direct supervisor.

THE COURT: What's that date again, sir?

A: February 28th.

THE COURT: Okay.

A: And she opened up a new investigation that involved a Michael Blaine Shatzer, Jr. Sergeant Kifer

assigned me to do a follow-up investigation because Detective Blankenship had been on leave, and he went ahead and assigned that case to me.

Q: When you say that Ms. Lohman opened up a new investigation, were you aware that there was an old one?

A: She had told me there was an old investigation incurring the same allegations. However, apparently during the disclosure on the initial investigation wasn't full or detailed enough to go forward with the investigation. She opened up a new investigation because these same allegations had popped up again. And we had arrangements to re-interview the child in fact on that same day.

Q: And did you..., and did you in fact participate in the interview of Michael, Jr.?

A: I was present. The interview was conducted at the Child Advocacy Center. It was done in an interview room. Brenda Lohman interviewed the child. The interview was videotaped and used defining words technique to do the interview.

Q: Was it all..., in addition to being videotaped was it also...., were you able to monitor by closed circuit t.v.?

A: I was. I listened to the entire interview. Yes, I did.

Q: Were the allegations specific this time around?

A: They were, they were.

Q: Based on the allegations you heard, what action did you take?

A: After, uh..., I was...., I was impressed with the interview that was conducted and obtained, uh, from Michael Blaine Shatzer, Jr. Based on that, I had made arrangements to interview the child's father, Michael Shatzer, Sr., who was incarcerated at the Roxbury Institute. And I did that on March 2nd at about 9:30 in the morning. Brenda Lohman also accompanied me to the interview at Roxbury Institute.

Q: Now, Detective, did you have any conversations with Detective Blankenship prior to going out to RCI to interview Mr. Shatzer?

A: I had not.

Q: When was the first time you recall talking to Detective Blankenship about this case?

A: It was probably at least a week later. And I told him I had received this investigation and...., and actually our conversation was very curt. I mean we talked about it and we continued on with the investigation. And I don't remember anything really remarkable about the conversation we had.

Q: But the...., but it's your testimony that the first time you talked to Detective Blankenship about the old case, you had already completed your investigation and suspect interview in the new case?

A: Well I had already interviewed, um, Michael...., the Defendant, at Roxbury, and made arrangements to re-interview him again with Detective Schultz.

Q: Okay. Did the interview with Detective Schultz occur before or after you talked to Detective Blankenship?

A: You know, I don't know. I don't know.

Q: Okay. Well let's go back to the interview at RCI.

A: Okay.

Q: You stated that you took the...., you interviewed or rather Michael, Jr., was interviewed on the 28th of February.

A: He was.

Q: And that you went out to RCI and interviewed the Defendant on the 2nd of March.

A: Yes ma'am.

Q: Okay. And when you interviewed him, was Ms. Lohman with you?

A: She was.

Q: Okay. She's not here today. Do you know why?

A: Uh, I personally don't know why.

MR. CREEDEN: I'll stipulate to the *Miranda* form. That's...., that's not an issue.

Q: Why don't we just...., we could just get that this is his signature. I'm showing you what's been marked as State's Two for identification purposes, I guess it's State's Exhibit Two. Can you tell us what this is?

(State's Exhibit No. 2 Marked for Identification)

A: It is a standardized Hagerstown Police Department Waiver of *Miranda* Rights form. It was signed...., this is a copy, it was signed by Michael Shatzer. The time is March 2nd, 2006, at 9:36 a.m., at Roxbury Institute, and I witnessed the signature.

Q: Move to admit.

MR. CREEDEN: No objection.

THE COURT: Be admitted.

(State's Exhibit No. 2 Admitted Into Evidence)

Q: Now did Mr. Shatzer seemed surprised to see you?

A: Yeah. In fact, I recall him saying that he thought that this...., these allegations were investigated previously. And I told him we were back, and we were talking to him again about the same allegations. I was up front and told him why we were

there and what we were doing.

Q: Did he go through the *Miranda* form with you?

A: Yes.

Q: Did you read it to him or did he read it to himself?

A: I read it to him.

Q: And he signed each and every...., initialed each and every line?

A: He initialized, uh, initialed each line and then signed the bottom of the waiver, the waiver statement.

Q: And at that point, did he agree to talk to you?

A: Yes.

Q: Did he at any time say, "I want an attorney"?

A: Never.

Q: Did he....

A: At that interview.

Q: At that interview, okay.

A: Right.

Q: Just focusing on this interview....

A: Okay.

Q: ....we'll get to the other one, did he indicate to you that he had had a previous interview with Detective Blankenship?

A: He did.

Q: And did he tell you how that interview ended?

A: No, he didn't.

Q: Did you...., did he ever say to you while talking to Detective Blankenship that he wanted...., he thought Shane was a lawyer and that he wanted a lawyer?

A: He never said that.

Q: Okay. Now when you interviewed him, how long would you say you were in that interview?

A: Maybe...., it wasn't very long, maybe a half hour at best.

Q: And this was in an interview room at RCI?

A: Uh, it was a room. It was...., uh, it was...., actually I though it was more of a maintenance room than anything else. They gave us a couple of desks and a couple of chairs. And I don't know if it's really meant to be used as an interview room, so....

Q: When you say a couple desks, how many desks?

A: Well, a desk, I'm sorry, and a couple of chairs.

Q: A desk, okay. Did everyone have a chair? You, Ms. Lohman, and the Defendant?

A: Yes.

Q: Were you...., was it comfortable with a desk and three chairs in there?

A: I think so.

Q: You didn't feel...., did you feel crowded?

A: No.

Q: Now did anyone have a weapon on?

A: No.

Q: Did Mr. Shatzer appear to be in...., well let me back track, what was he wearing?

A: Um, you know, I don't know. I don't remember. I think some kind of a jumpsuit, but I don't recall exactly what he was wearing.

Q: Did he feel...., appear to you to be physically fit?

A: He seemed fine to me.

Q: Okay. And did he appear to be under the influence of anything of any kind?

A: He...., he seemed fine.

Q: And in fact he was in prison when you interviewed him?

A: He was.

Q: Did he seem to understand what you were talking to him about?

A: I think so.

Q: Did he have any trouble following you as you went over his rights per *Miranda*?

A: I don't believe so. I think he did just fine.

Q: Did you discuss with him the level of education that he had?

A: Um, I don't think I did.

Q: How old is he?

A: He's forty-seven years old.

Q: Okay. And that's how old he was when you interviewed him?

A: Yes.

Q: Okay. Did he ever ask you for permission to leave that room to use the restrooms?

A: He did not.

Q: Did he ever ask permission to eat or drink anything?

A: No.

Q: Was there any time that he was in your presence in that room that he seemed in any kind of distress?

A: Not at all.

Q: Now when you went over the *Miranda* rights with him was Ms. Lohman in the room?

A: He was. She was, I'm sorry.

Q: And after signing over his waiver, did he speak with you?

A: He did.

Q: And did he discuss the allegations about...., regarding his son, Michael, Jr.?

A: He did.

Q: How did that interview end?

A: Um, I had asked him if he would submit to a polygraph examination, and he agreed to submit to that test. Uh, I had to go and make arrangements to run that polygraph test, and we decided to go back

down to the prison and run the polygraph examination there.

Q: And who ran the polygraph examination?

A: Detective Shawn Schultz.

Q: Were you present during this exam?

A: I was...., I was there. I was not in the same room while the examination was being conducted, but I was there, and I was there during the last....

THE COURT: This was on a different day?

A: I'm sorry?

THE COURT: This was on a different day?

A: It was, sir.

THE COURT: What was that...., the next day?

A: Uh, the second time we went down, that day was on March 7th of 2006.

THE COURT: Five days later?

A: I'm sorry?

THE COURT: Five days later?

A: Yes sir.

Q: Now Detective Schultz was with you that time.

A: He was.

Q: Was Ms. Lohman with you?

A: No, she was not.

Q: Were you present during the...., any rights that may have been read to Mr. Shatzer by Mr....., by Shawn Schultz?

A: No. Typically, that's the practice done by the polygraph operator and a standardized *Miranda* warning is read to him again before the...., any questioning or any further examination procedures would have commenced.

Q: But you were not present for....

A: I was not in the room when he did that, no, I was not.

Q: And in fact, Detective Schultz, who wasn't subpoenaed for today, is in the middle....., is conducting a polygraph examination as we speak?

A: Yes.

Q: And may be available later this afternoon?

A: Um, I'm guessing, yes.

Q: Okay. After...., so you were not in the room, just

so that we can clarify this, when the polygraph examination was conducted?

A: That's not standard practice, no ma'am.

Q: Okay. But after it was concluded, who did you speak with first?

A: After the test was over, I was informed by Detective Schultz...., uh, we talked about the test, and Detective Schultz scored the test and he scored him as failing the test. And Detective Schultz will ask, usually will ask the investigator if they want to do the interview, or if they wanted to do it together, or if you wanted him to do it by himself. And we...., we chose to interview him together. Detective Schultz had already established a rapport with the Defendant, and he initialized the interview and we went from there.

Q: Okay. And were you aware that he had waived *Miranda* to...., with Detective Schultz?

A: I did. I saw the forms.

Q: Okay. Would he have...., would there have been a polygraph examination if he hadn't waived *Miranda*?

A: If he had not waived *Miranda*, it would have stopped right there.

Q: So you're...., you're in this conversation now with Detective Schultz and Mr. Shatzer?

A: Right.

Q: Is this the same room that you had been in before?

A: Yes.

Q: Okay. And were you...., was there anything substantially different about this room this time?

A: No. It was pretty much the same room. Detective Schultz arranged the room that it would have benefited him the best how he had the instrument and how he was interviewing and everything. So it might have...., the desks may have been in a little bit different position. The chairs may have been in a little bit different position. But essentially we were in the same room, same desk, same everything.

Q: Aside from the physical constraints, or rather physical pieces of the polygraph machine, did...., was the Defendant in any way bound or shackled or anything like that?

A: He was not.

Q: Was he the first time?

A: He was not.

Q: Okay. And did he appear comfortable to you?

A: I believe so.

Q: Did he seem to be in the same frame of mind as

he had been five days prior?

A: Yes.

Q: And did he seem at that point still willing to talk to you about this case?

A: Yes.

Q: Did you have any reservations about his state of mind on the second interview?

A: None whatsoever.

Q: And based on what you...., his *Miranda* waiver did you and Detective Schultz begin to question him?

A: We did.

Q: Did he give a statement at that time?

A: He did.

Q: How did that statement end?

A: Uh, it come to a point in time where Mr. Shatzer became very emotional, and at that time he requested an attorney, and the interview stopped.

Q: And have you had any contact with him since?

A: I had not.

Q: Has Detective Schultz to your knowledge had

any contact with him since?

A: To my knowledge he has not.

Q: Okay. And after the conclusion of this second statement, what action did you take as a Detective in this case?

A: Um, I reviewed this case with Michele Hansen. And based on that review, I decided to go ahead and file charges against Mr. Shatzer.

Q: And is the first time you've seen him since that last time at RCI?

A: It is.

Q: Okay. Thank you. And the person you see in the courtroom is that the one who made statements to you at RCI on March 2nd and March 7th, 2006?

A: He's seated to Mr. Creeden's left in the blue shirt.

Q: And this is the same gentleman who signed *Miranda* in your presence on March 2nd, 2006?

A: It is.

Q: I have no other questions.

END DIRECT EXAMINATION

THE COURT: Mr. Creeden.

CROSS-EXAMINATION

By Mr. Creeden:

Q: Yes. Now you prepared the statement of charges in this case, is that correct?

A: I did.

Q: And in that statement of charges there's no reference to the attempted interview of Mr. Shatzer in 2003 by Lieutenant Blankenship?

A: No.

Q: When you saw Mr. Shatzer the first time this year, I forget the date, March....

A: Uh, February 28th.

Q: February 28th.

A: I'm sorry, March 2nd.

Q: March...., that sounds better.

A: Okay, March 2nd.

Q: March 2nd and March 7th, I think.

A: Right.

Q: On March 2nd this year when you and Ms. Lohman went to see Mr. Shatzer, he was surprised I

think you said to Ms. Cirincion because he thought it was over.

A: Yes.

Q: Okay. And you said, "We've...., we've opened a new file, it's the same allegations", something like that.

A: Words to that effect, yes sir.

Q: Okay. Now Ms. Lohman was involved in the 2003 investigation. Were you aware of that?

A: Uh, I recall her telling me that she was involved in the initial investigation. She briefly told me what occurred during the initial investigation, but I don't....., I don't...., other than that, that's all I know.

Q: You didn't know Lieutenant Blankenship had gone to see him at that time or you just don't remember?

A: You know, I probably read it in the file that Ms. Lohman had, but....

Q: Did you know there had been a hearing in 2004 by DSS regarding disposition of the child abuse allegation?

A: No, I was not aware of that.

Q: So you wouldn't have reviewed the report from that hearing in 2004?

A: I would not, sir.

Q: Now it's fair to say on March 2nd of this year, you didn't go to RCI to interview Mr. Shatzer because he said, "Come on out and talk to me"? He didn't ask you to come out.

A: No. I went there on my own. I made....

Q: Right. I mean he didn't initiate the contact. He didn't say....

A: Mr. Shatzer?

Q: Yeah.

A: No.

Q: There's no question you went out with the reopened investigation?

A: Yes sir.

Q: He did nothing to have you come out there to see him.

A: Yes sir.

Q: And although he wasn't in shackles or handcuffs, he's at a correctional institution, correct?

A: Yes sir.

Q: So although you get to leave, he doesn't.

A: That's true.

Q: Okay. Both on March 2nd and March 7th?

A: Yes sir.

Q: Okay. He's in custody. Um...., so you...., and you were aware that what you were investigating were basically the same thing as what was previously brought up? You were aware it was the same....

A: Yes.

Q: .... incident basically.

A: Yes.

Q: It's not something different.

A: Well the allegations are actually a little bit different because of the disclosure from the child, but essentially it's the same.

Q: Well I was going to say, you don't know what the earlier allegations were.

A: I don't know.

Q: So how do you know that?

A: Well Ms.....

Q: If you don't know what the earlier allegations were, how do you know they're different or the same?

A: I know that when Ms. Lohman and I spoke of this investigation, she had told me that the child was really hinky on the initial...., or the information he was providing the investigators the first time. So it is different in a way, I guess.

Q: Based on that, and I'll need to get a copy of this because I just got this today, got a report consisting of one, two, three, four, five, six, seven, eight, nine, ten pages. That's the DSS....

MS. CIRINCION: Is that the one I sent you?

Q: No. This is from my client.

MS. CIRINCION: Oh.

Q: Ten pages marked as Defense Exhibit One for identification.

THE CLERK: May I staple them?

Q: Yes, you may.

(Defense Exhibit No. 1
Marked for Identification)

I'm going to hand you what's marked as Defense Exhibit One for identification and ask you to look at that. Have you seen that before?

A: I have never seen this report.

Q: Well I'd ask you to glance through it if you

would.

MS. CIRINCION: Objection, Your Honor. He's never seen it. There's no reason for him to know the contents of it.

A: I have never seen this report.

Q: Well, okay. In fact what I was going to...., I can offer it into evidence. Basically, it describes almost identical circumstance as the charge that's currently before the Court. That there is not a great difference.

THE COURT: Where...., where is this...., what is this....

Q: That's fine. That's fine. I'll...., I'll...., this is offered in response to the fact that the charges might be somewhat different. This is the report from '03, basically the same....

THE COURT: But whose report?

Q: I'm sorry, Department of Social Services.

MS. CIRINCION: May I see the exhibit?

Q: Sure.

MS. CIRINCION: Because the report I have from '03 is much shorter.

Q: That's I mean that's what I'm trying to get to here is that there may be a slight difference, but it's....,

what I'm focusing on here, and if the State wants to concede, we're talking about the same incident. For *Edwards* purposes, it has to be the same investigation, not something different. That's what I'm getting at.

MS. CIRINCION: We will stipulate....

Q: Okay.

MS. CIRINCION: .... that this is the same incident.

Q: Okay.

MS CIRINCION: The difference is the time lapse and the ability of the child to disclose. That's why there was a time lapse.

Q: That's fine. As...., for...., I mean I'm arguing *Edwards* here. I'm not arguing *Miranda* at all.

THE COURT: Well there's no question that's the report from DSS, right?

Q: Right.

MS. CIRINCION: Right.

THE COURT: I'm going to...., I'm going to admit it. It may be helpful to me to....

Q: Okay. Thank you, Your Honor.

THE COURT: .... to see what it is.

(Defense Exhibit No. 1
Admitted Into Evidence)

Q: And I...., I want the State to know I got that when we started the hearing. Mr. Shatzer brought it with him. So it's the first time I've seen it.

THE COURT: Mr. Creeden, any other questions?

Q: Just one, Your Honor. I didn't want to interrupt.

THE COURT: Go ahead, go ahead.

Q: Is it fair to say that Ms. Lohman never told you that Mr. Shatzer had asked for a lawyer back in '03?

A: That was...., she never told me that.

Q: No further questions.

THE COURT: I didn't hear your....

A: She had never told me that, Your Honor.

Q: Thank you.

END CROSS-EXAMINATION
RE-DIRECT EXAMINATION

By Ms. Cirincion:

Q: Detective, your...., your desk is actually at the Hagerstown Police Department, correct?

A: It is.

Q: Okay. And Detective Blankenship's desk is where?

A: His desk...., he has two desks, but mostly he spends most of his time at the Child Advocacy Center.

Q: So you don't have daily contact with him?

A: I see him every day, but sometimes less than others.

Q: Okay. And did you review any DSS records when you took on this case?

A: I did not.

Q: Had you known that the Defendant or had you heard that the Defendant had asked for an attorney the first time this case was investigated, what action..., what would you have done differently, if anything?

A: I don't think I would have done anything differently. I think I would have proceeded the way I did. I don't think I had a choice of the matter at the time. I had to do an investigation.

Q: And there was no concern in your mind when you interviewed the Defendant that he understood all of his rights including the right to have an attorney?

A: I believe he understood his rights.

Q: Thank you. Nothing further.

END RE-DIRECT EXAMINATION

THE COURT: Mr. Creeden?

MR. CREEDEN: Nothing further.

THE COURT: Thank you, sir. You can step down.

END TESTIMONY OF
DETECTIVE PAUL STEVEN HOOVER

MS. CIRINCION: Your Honor, at this time, I would ordinarily call Brenda Lohman. Brenda Lohman had a funeral today and she was having a pretty difficult time emotionally. If we have a recess, I can try to see how she's doing, but frankly, I didn't think it was fair to her to drag her in here. I'd like to see how she is. At the same time, we would like to move this along because we do have a trial date September 21st, and it's in Michael, Jr.'s, best interest not to delay this which is why I wanted to try to get most of this done today.

THE COURT: Okay.

MS. CIRINCION: Additionally, if we can have a brief recess, I will check on the status of Detective Schultz.

THE COURT: Okay, yes.

MS. CIRINCION: Thank you.

(Whereupon this matter went into recess from 2:10 p.m. until 2:42 p.m.)

MS. CIRINCION: Your Honor, I believe that we've agreed that the testimony is closed at this point in the hearing. Detective Schultz is here if you wish to hear from him. And it's also my understanding based on chamber's conversation that we're going to briefly argue this matter today and submit case law to you so that you can make a decision. It will not be forthcoming today.

Your Honor, the Defendant is...., is charged with a number of sexual offenses against his biological son. The State's position is that the statements that he gave to Detective Hoover and then secondly to Detective Hoover and Detective Schultz were constitutional and in compliance with the Fifth and Sixth Amendments as well as the...., as Maryland constitutional law regarding voluntariness. And I don't believe there's much contention about whether or not *Miranda* was given properly or that the circumstances of the interview were in fact voluntary. And we have gone through a number of the factors that indicate voluntariness during the testimony of Detective Hoover. However, the issue that is staring us all in the face is the *Edwards against Arizona* issue, which goes to what police officers can do if a suspect asks for an attorney and the interview is concluded. In this particular case what happened was, and there's no...., there's no disagreement here that Detective Blankenship in 2003 went out to then MCI to talk to the Defendant and Mirandized him. Very clearly we have a Hagerstown Police Department *Miranda*

Waiver. The rights were read to the Defendant and he waived them. However, he did upon becoming confused ask for a lawyer, and that was the end of that interview. The...., the child in this case aged three more years, became more articulate and disclosed anew these allegations with more detail. At the time that the disclosure came in and the report came in, Detective Blankenship, the assigned child abuse Detective, was unavailable and so the case was assigned to Detective Hoover. Detective Hoover and Brenda Lohman the same day spoke with Michael, Jr., Within two days, March 2nd, Detective Hoover was out at the jail with Ms. Lohman, this time RCI, and spoke with the Defendant. Three years had passed. There was no conversation between Detective Hoover or anyone whether the police department or Mr. Shatzer himself in which there was an indication that the right to an attorney had been invoked. In fact when Detective Hoover went out there, he went out as if this were a new case, read the *Miranda* rights to the Defendant, who waived them, and proceeded to give a statement. In fact at the end of the statement, he was asked to submit to a polygraph examination and he...., he agreed to do so. Five days later, met with another detective, again was read his rights per *Miranda*, again waived those rights and gave a second statement. And the question becomes, did the police...., do we let the second and third statements in because of the prior invocation? Your Honor, we will be preparing a short Memorandum or at least a letter with some case law. The State's position, what we're going to ask that you find is that the *Edwards against Arizona* case was designed to deter police conduct in going out and re-interviewing or trying to interview a

suspect who had already invoked his right to an attorney. It shows and it suggests that it is a deterrence case and that the...., if that...., if the police behave improperly, then the sanction is suppression. In this case, there is no bad faith or bad acting by the police. There's in fact a time lapse that no one in this courtroom is responsible for. It's clearly just that a child matured enough that he was able to tell what happened. And when a new detective without any other information gets into this case and does his job, the sanction of suppressing a confession in a case of this...., of such a serious nature is not in the interest of the public at all. In fact, it suggests that even though the police had no wrongdoing whatsoever, we would be too broadly applying *Edwards*. And so we will ask that when you read the cases submittedto you that you find that although *Edwards against Arizona* is the initial inquiry in this case, that this case will rest on the fact that the police acted at all times in good faith.

THE COURT: Now just so I'm clear, when Detective Hoover went out and interviewed the Defendant on the 2nd of March, everyone would agree that of course he had not talked to Detective Blankenship about the case. He didn't know that the Defendant had requested an attorney in 2003, at that time?

MR. CREEDEN: Right, apparently. That's what he says.

THE COURT: Okay. All right, Mr. Creeden.

MR. CREEDEN: Um, if I may present my argument, Your Honor. There is, first of all, the great

distinction between properly reading somebody their *Miranda* rights, somebody asserting the right to remain silent, and in this situation, which is the right, asserting your right to an attorney, under *Edwards versus Arizona* which is 451U. S. 477, a 1981 Supreme Court case. Issues that arise under *Edwards* are, first of all, did the Defendant assert, clearly assert his right to counsel? That doesn't seem to be contested that in 2003, when he was interviewed at the prison by Lieutenant Blankenship, he said he wanted his attorney present. In fact, LieutenantBlankenship read from his report. So I don't think there's an issue in this case as to whether or not Mr. Shatzer properly invoked his right to counsel, to have counsel present. There is case law which says merely allowing someone who's asked for counsel to consult with an attorney and then to go back and interrogate them is not enough. That the attorney has to be present for further interrogation. The second issue is, what protection, once you've invoked the right to an attorney,what protection does that afford you? And of course the protection is there can be no interrogation without initiation of contact by the Defendant. And again, in this case, there doesn't seem to be any issue when I asked Detective, he had indicated that Mr. Shatzer did not ask for them to come out and talk to him this year. That they went out because they had reopened the investigation. So there's no issue that Mr. Shatzer somehow initiated this contact with the police. At both times, both in 2003 and in 2006, he's been incarcerated. In fact, he was transferred. So initially, he was at Jessup, MCI Jessup, MCI-H, Hagerstown, and how he's at RCI for the same offense, but he's been incarcerated on both occasions. And the

issue...., now there is the wild card which is the fact that there is a report offered as Defense Exhibit One, which indicates that in 2003/2004, there is a record of the fact that Lieutenant Blank...., that...., that Lieutenant Blankenship indicated Mr. Shatzer wanted an attorney present. Now we don't question Detective Hoover's truthfulness when he says he didn't know that. The issue I guess is if you're reopening an investigation, do you have an obligation to review the prior police reports or prior reports in the case to see what...., you know...., I just ask that question. I can't answer it. There seems to be clear assertion of the right to counsel. We're dealing with the exact same case, so it's not a different subject matter. It's the same investigation.

THE COURT: Same incident.

MR. CREEDEN: Same incident, not initiated by Mr Shatzer. So it seems to me that this case rises and falls on whether or not somehow the time passage somehow mitigates and vitiates the request for an attorney under *Edwards*. And I don't...., off the top of my head, I don't have a case that answers that. And that's all I have.

THE COURT: Ms. Cirincion?

MS. CIRINCION: Your Honor, at this time, I'll just reserve for the letter with the case law.

THE COURT: Okay. Counsel, submit to me any cases that you would like me to read.

MR. CREEDEN: Yes, Your Honor.

THE COURT: I'll be glad to do so. And I'll render an Opinion as soon as possible.

MR. CREEDEN: Thank you, Your Honor.

MS. CIRINCION: Thank you, Your Honor. I believe that's the docket.

(Whereupon this matter was adjourned at 2:52 p.m.)

I HEREBY CERTIFY that I reported verbatim by electronic device the proceedings in the matter of *State of Maryland v. Michael Blaine Shatzer, Sr.*, Criminal No. 21-K-06-37799, in the Circuit Court for Washington County, Maryland, on August 29, 2006, before the Honorable John H. McDowell, Judge.

I further certify that the proceedings were transcribed by me to the best of my ability in a complete and accurate manner, and page numbers 1 through 45 constitute the official transcript of the proceedings.

In witness whereof, I have affixed my signature this 20th day of February, 2007.

_____

Dee A. Barnhart, Court Reporter

OoO

IN THE CIRCUIT COURT FOR
WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND *

VS. * 21-K-06-07799 CRIMINAL

MICHAEL BLAINE SHATZER, SR. *

*

TRANSCRIPT OF PROCEEDINGS

Courtroom Number 3
Hagerstown, Maryland
September 14, 2006

The above entitled matter came on for hearing in open court at 1:00 P.M.

BEFORE:

THE HONORABLE JOHN H. MCDOWELL
JUDGE

Appearances:

Gina Cirincion, Assistant State's Attorney for Washington County, Maryland, Appearing on behalf of the State of Maryland

Carl Creedon, Esquire, Appearing on behalf of the Defendant

Christine B. Ellis, Court Reporter
Court House
Hagerstown, Maryland 21740

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THE COURT: Good afternoon. We're here in the case of Michael Blaine Shatzer. The purpose of calling you all here today was for the Court to announce its decision in this case. This is scheduled for what? Next week?

MS. CIRINCION: Yes, next Thursday.

THE COURT: Next Thursday. Okay. So, I wanted to get this in as quickly as possible. I did give counsel time to present me any case law that would have been pertinent. But thankfully, with the help of my law clerk, I found a case that is dipositive of the issue.

Let me just go over the facts as I know them in this case. First of all, it appears that on . . . in July of 2003, Detective Blankenship received a referral from the Child Advocacy Center of the Department of Social Services regarding the defendant. At that time it was alleged that the defendant had been doing things that indicated that he was molesting, I believe it was his son.

Detective Blankenship contacted the defendant at the Maryland Correctional Institution on August seventh, 2003. At that time the defendant was incarcerated for an unrelated offense. One that, of course, dealt with a sexual abuse, child sexual abuse type of matter, but of a different child.

The defendant, Mr. Shatzer, was read his *Miranda* rights. At that time he thought Detective Blankenship was an attorney and as a result of that confusion or for whatever reason, he refused to talk to the Detective

without the presence of an attorney. The next contact he may have had, that is that detective with the defendant, was at MCI once again when there was a Department of Social Services case of some kind transpiring but he only saw the defendant. He may have said hello to him but had no occasion whatsoever to talk to him.

Ah, Detective Hoover began an investigation February twenty-eighth, 2006 about the same sexual abuse matter that Detective Blankenship had been investigating back in 2003. Detective Hoover, however, did not know of any previous contact at that time between Detective Blankenship and the defendant, nor of any request by the defendant to have an attorney present during any discussions.

New information apparently had arisen because the child was then more mature, able to articulate what had happened to him several years before and the allegations against the defendant were more specific. So, because of that Detective Hoover on March second, 2006 interviewed the defendant at the Roxbury Correctional Institution. Present at that time was Brenda Lohman of the Department of Social Services, who, I believe, may have been present on the August seventh, 2003 occasion when he was questioned or attempted to be questioned.

On March second, 2003 when Detective Hoover was about to question the defendant, *Miranda* rights were read to him once again. He signed them, initialed them at the appropriate locations and agreed to speak with the detective. The defendant was surprised that

Detective Hoover was there because alle . . . he thought allegations had been disposed of.

Once again, he signed and initialed the document, waiving his *Miranda* rights, did not ask for an attorney. I think he may have said that there was a prior interview with Detective Blankenship but there's no mention, once again, that he previously had requested an attorney. So, that had taken place on March second, 2003.

Detective Hoover asked him to submit to a polygraph, which he agreed to. On March seventh, apparently, once again *Miranda* was read to him. He submitted to a polygraph and was interviewed once again and did not request the presence of an attorney.

He became very emotional and therefore stopped. Ms. Lohman never said anything to Detective Hoover about the defendant wanting an attorney in the past and Detective Hoover until recently, it appears, did not know of the previous investigation or specifically, that during the investigation, the discussion that Detective Blankenship had with Mr. Shatzer, that he had requested an attorney back in 2003.

Between July of . . . I'm sorry, August seventh, 2003 when Detective Blankenship saw the defendant at MCI and March sixth of 2006, when Detective Hoover interviewed the defendant at RCI, two years and seven months had transpired and expired.

So, that's basically the facts as I know it. This was an interesting case and I thank counsel for bringing it

to my attention because, quite honestly, I didn't know the answer to this and I don't think anybody else did.

We know from the *Edwards* case that was cited by Mr. Creeden, *Edwards versus Arizona*, a Supreme Court case, that once a custodial interrogation takes place, pursuant to that case, the police are not allowed to resume questioning until typically a defendant re-initiates further communication with the police. And if not, during re-interrogation counsel has to be present.

In this case, of course, neither of those things occurred. The . . . in the *Edwards* case the police questioned the defendant. He asked for an attorney. The questioning temporary ceased and the next day he was re-interrogated by a different police officer after once again being re-advised of his *Miranda* rights.

The Supreme Court held that the use of the defendant's confession against him at trial violated his Fifth and Fourteen Amendment Rights to have counsel present during custodial interrogation. Other cases have reaffirmed that. *Arizona versus Robertson*, which is a case where three days after the initial interrogation where the defendant had requested the presence of counsel, a re-interrogation took place. In that case it was for a different crime and the defendant was still in jail. But once again, the Supreme Court said that *Edwards* prohibited against re-interrogation and that this applied even if the re-interrogation was unrelated to the crime that was the focus of the original questioning and even if the officer who conducts the re-interrogation was unaware that the

suspect had previously requested counsel.

Various other cases including *Michigan versus Harvey* indicate that *Edwards* . . . the holding in *Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.

And, so, that's really the status of the law. But the case that was found that is dispositive, at least for the purpose of this State's holdings, is the case of *Clark versus State*, which is 140 Md Ap, 540. It's a 2001 case.

In that case the defendant was suspected of having abducted and murdered or killed in some manner a very young girl. The defendant was interrogated several times about his involvement and . . . excuse me for a moment here, on November sixth, 1992 he was interrogated once again after a suspicious . . . time that he had spent in the State of Massachusetts.

November sixth, 2002, the defendant was deprived of sleep. He asserted his right to counsel on a number of occasions and even though he repeatedly requested counsel to be present, the police refused to allow that to take place. And although he did not incriminate himself at that time, nevertheless he did without question on a number of occasions request the presence of counsel during the interrogation.

The next year, the defendant plead guilty to an unrelated murder and the defendant was sentenced to serve thirty years incarceration. While he was

incarcerated, surprisingly or not, at one of the institutions; I believe it was MCI here or MCTC, in Hagerstown; he was re-interviewed by the Montgomery County Police officers.

At that time, once again, he was incarcerated in one of the prisons here. He was also talked to by a correctional case worker. He was re-Mirandized, waived his rights to *Miranda* and spoke to the police about the disappearance of the girl that had been missing for the past six years or so.

So, the question was, essentially, whether the five year period of time was enough to essentially vitiate the *Edwards* requirement that once a defendant asserts his right to counsel, the police cannot go re-interrogate the defendant, even if he thereafter waives his Fifth Amendment rights unless and until he has the presence of counsel.

The defendant waived his right to counsel in this case and the Court of Special Appeals held that the statements that he made to the police officers in 1998 were admissible. Several cases were pointed to by the Court of Special Appeals as supporting their decision because the Supreme Court has never ruled on a case such as this where a lengthy time period had transpired between the assertion of one's right to have counsel and the re-interrogation.

The cases that I have just mentioned, the *Edwards* case and the other two cases that I can't just put my finger on right now, the re-interrogations occurred a day later, three days later. So, certainly there was no

break in the confinement and *Edwards* did apply. But the Court of Special Appeals cited various sources with approval. One was a dissenting opinion in a State of Alaska case where there was a break in custody.

The dissenting opinion, cited once again with approval, stated that "When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of public record, the anxiety and uncertainty that supports . . . support Miranda's finding of inherent coercion simply ceases to exist. When custody is . . . not related to any pending unresolved matter, it seems to me,"; that is the dissenting justice in Alaska "that there is little cause for concern that a police officer will appear to control the suspect's fate."

It went on to say, "If it is safe to say under the existing case law that a sentenced prisoner cannot automatically be deemed to be in continuing *Miranda* custody, then it is equally safe to say that a sentenced prisoner who invokes the right to counsel upon being interrogated under circumstances amounting to *Miranda* custody and is thereafter returned to normal sentenced-prison status should not automatically be deemed to be in continuous custody under *Edwards*. Once returned to the ordinary routine of other sentenced prisoners - without any vestige of inherently coercive circumstances incidental to custodial interrogation - the prisoner should be treated, for *Edwards* purposes, in the same manner as any person who has been arrested, questioned in custody, and

released."

Once again, various other sources were pointed to in support of this, including a case, *U.S. versus Arrington*, which is a federal case. There are various other cases. One of which is *United States versus Hall*. In *Hall* the . . . that's a federal case, as well, the Sixth Circuit held that three months that transpired after the original requesting of counsel and the re-interrogation was enough to break the in custody . . . the period of time that the defendant is in custody as the term is used in the context of *Edwards* and *Roberson*.

Once again, here we have a case in which there is two years and seven months and the Court of Special Appeals found that the five year period of time that was elapsed between the original assertion of right to counsel . . . a right to counsel and the re-interrogation broke that chain of events for *Miranda* purposes, for Fifth Amendment and Fourteenth Amendment purposes and therefore the statements made after the re-interrogation was not inadmissible as a result of *Edwards*.

Specifically, the Court focused on whether there was an inherently coercive nature of confinement at the time of the re-interrogation. And the Court of Special Appeals found that in the *Clark* case that, "There is little in the Court's cases to suggest that the great potential for coercion exists shortly after arrest . . . I'm sorry, existing shortly after arrestor arguably at the . . . any time pre-trial, also continues to exist for every moment of all the subsequent years of the defendant's incarceration."

"There is no good basis for extending this fiction to insulate some suspects from questioning for years or even their entire life based on a single request."

The Court went on to hold, also, that, "Release into the general prison population as a sentenced prisoner can have the same effect ending both Miranda custody and the question-proof status conferred by an earlier invocation of a right to counsel."

Essentially, the Court was saying that once a defendant is released into the general population, after he is a sentenced prisoner, which Mr. Shatzer was in this case, that the *Miranda* type of custody essentially dissipates, particularly after a significant amount of time transpires.

The Court also found that adopting the rule suggesting that the defendant should be interview proof for a long period of time would produce absurd results. "It would," I'm quoting here, "Create a class of prisoners who are forever question proof even though law enforcement officers would have no way of knowing that the prisoner enjoys question-proof status."

The Court of Special Appeals also recognized that the other cases dealt with very short periods of time between the original assertion of right to counsel and re-interrogation. Recognizing that the evil to be avoided was the badgering by police officers, the coercive nature of re-interrogation shortly thereafter and the effect of attempting to have defendants waive their rights . . . the *Miranda* rights by that re-

interrogation after the assertion of one's right to have an attorney.

And, specifically, as it relates to this case, the Court of Appeals said that, "Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to this rule is not required."

So, the Court found that because of the time period that elapsed; in that case it was five years; but once again, it's cited to other cases where much shorter periods of time between the original interrogation and the re-interrogation would not be conducive to in custody *Miranda* type of interrogation, if re-interrogation took place. The Court looked at the time period between the right to counsel was requested and the re-interrogation and found that the trial court did not violate the *Edwards* rule in denying the motion to suppress the later statement given to the police officers.

This case is very similar to the case at hand. Like I said, we're dealing with a case in *Clark* where there was a five year period. Here we have two and one half . . . two and . . . a little bit more than two and a half years gap between the original interrogation, the original questioning by Detective Blankenship, the assertion of his right to counsel andthe re-interrogation by Detective Hoover where he waived his right to counsel.

He was, from what I understand, in custody throughout that entire period of time. He was placed back into general population from what I can glean from everything that's been testified to. When Detective Hoover went to see him there were no threats made. He was not armed. There were no handcuffs placed upon the defendant. He was in a room, comfortable in all respects. Did not request water, food. Did not appear to be having trouble understanding anything that was happening. And freely and voluntarily waived his right to counsel, waived his right to remain silent. There were no threats of any kind. In looking at the totality of the circumstances his statement to Detective Hoover and later on to Detective Schultz and once again to Detective Hoover was completely voluntarily in accordance with state law.

There was a break in custody for *Miranda* purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edward*; that is to not question the defendant without having an attorney present once he asserted those rights; did not apply. So, I would find that in this case because of the significant length of time, the fact the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, the fact that Detective Hoover did not know that the defendant had asserted his rights to have an attorney back in August of 2003, all this leads the Court to find that the defendant's motion to suppress the statements that he made to Detective Hoover and Detective Schultz in March of

2006 must be denied.

The motion to suppress will be denied.

MR. CREEDEN: Thank you, your Honor.

THE COURT: Thank you.

MS. CIRINCION: Thank you, your Honor.

-oOo-

I HEREBY CERTIFY, that the aforegoing is a true and accurate transcription of the proceedings in State of Maryland versus Michael Blaine Shatzer, Criminal Trials 21-K-06-37799 in the Circuit Court for Washington County, Maryland, held on September 14, 2006.

Christine B. Ellis, Court Reporter

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

STATE OF MARYLAND

vs. NO. 21-K-06-37799

MICHAEL BLAINE SHATZER

Defendant

OFFICIAL TRANSCRIPT OF PROCEEDINGS

NOT GUILTY STATEMENT OF FACTS

Hagerstown, Maryland
September 21, 2006
1:20 P.M.

BEFORE:
THE HONORABLE M. KENNETH LONG, JR.,
Associate Judge

APPEARANCES:
For the State of Maryland:
GINA CIRINCION, ESQUIRE

For the Defendant:
CARL CREEDON, ESQUIRE

Transcribed from electronic recording by:
TRACY L. ZAMORA, Court Reporter
Circuit Court for Washington County, Maryland
95 West Washington Street
Hagerstown, MD 21740

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PROCEEDINGS

MS. CIRINCION: Your Honor, this is the matter of Michael Blaine Shatzer, Sr., Criminal Trials number 37799. It is my understanding that the defendant is going to enter a not guilty statement of facts to the charge of sexual child abuse by a parent. It is also my understanding that the following charges will be, well Mr. Creeden is moving to dismiss and we are consenting to the dismissal of the misdemeanors whose statute of limitations expired. And we would be nol prossing the second degree sex offense in exchange for the plea in sexual child abuse.

MR. CREEDEN: The not guilty statement of facts.

MS. CIRINCION: Not guilty statement of facts.

THE COURT: In exchange for the not guilty statement of facts.

MR. CREEDEN: Right. Now what we're doing here Mr. Shatzer, to make it clear, is that first of all counts three and four are being dismissed because they violate the statute of limitations. Count one will not be proceeded on. The State is proceeding only on count two, child sexual abuse, which is not a violent crime, carries up to 25 years incarceration. We are pleading not guilty to that and the evidence will be a statement of facts from the report and you are waiving your right to have a jury trial to do this. The reason we are proceeding this way is because it allows us to protect for appeal that issue I raised at the suppression hearing about asking for a lawyer, the *Edwards* issue.

DEFENDANT SHATZER: Okay.

MR. CREEDEN: Okay?

DEFENDANT SHATZER: All right.

MR. CREEDEN: Do you have any questions about that? And we're not going to do sentencing today. Sentencing would be delayed.

DEFENDANT SHATZER: Okay. So I'm not - - I'm only pleading to one - -

MR. CREEDEN: You are not pleading guilty, you are pleading not guilty but instead of having a full blown trial there is going to be an agreed statement of facts.

DEFENDANT SHATZER: Okay.

MR. CREEDEN: And that preserves our appeal right.

DEFENDANT SHATZER: Okay.

THE COURT: Mr. Shatzer, do you understand that you are entitled to trial by jury in this matter?

DEFENDANT SHATZER: Yes your Honor.

THE COURT: And by proceeding in this fashion you are waiving, you are giving up your right to a trial by jury. Do you understand that?

DEFENDANT SHAZTER: Yes your Honor.

THE COURT: Do you know what a jury trial is?

DEFENDANT SHATZER: It's a jury of 12 people.

THE COURT: Okay. And those 12 people would be selected from the motor/voter rolls from Washington County. Those 12 jurors would listen to the testimony, review any evidence that was introduced during the course of the trial, and listen to the arguments of counsel. After all that was done, then those jurors would retire and they would deliberate. The jurors would have to agree unanimously, in other words all 12 of them would have to agree that you are guilty beyond a reasonable doubt in order for you to be convicted. If even one juror was not convinced of your guilt beyond a reasonable doubt, then that particular jury could not find you guilty. Do you understand all that?

DEFENDANT SHATZER: Yes your Honor.

THE COURT: And by what, by what you are doing here today, you are waiving your right to a jury trial. Do you understand?

DEFENDANT SHATZER: Yes your Honor.

THE COURT: Is that what you wish to do, waive your right to trial by jury and proceed on a not guilty statement of facts?

DEFENDANT SHATZER: Yes your Honor.

THE COURT: All right. And by proceeding on a not guilty statement of facts, you are giving up the right for any witnesses to testify in this matter. There will simply be a recitation of the facts into the record and I will be called upon to decide on the basis of the evidence presented whether you are guilty or not guilty. Do you understand?

DEFENDANT SHATZER: I don't understand that part.

MR. CREEDEN: It's basically a report of what the child says, what the police say you told them. Basically that's going to be read into the record. And based on that, the judge will render a finding of guilty or not guilty. But it preserves our right to have an appeal.

DEFENDANT SHATZER: Okay and if I'm found guilty, then what?

MR. CREEDEN: It's my understanding - - Well I know that the State seeks to have you incarcerated continuously through October 2015. So at a minimum if you are found guilty I know the State is going to be seeking that.

DEFENDANT SHATZER: Okay.

MR. CREEDEN: Okay.

THE COURT: Do you understand what is going on?

DEFENDANT SHATZER: I'm pretty sure I

understand what's going on.

THE COURT: Do you agree to this procedure? In other words, we are not going to have a trial here today. We are not going to have the calling of witnesses being placed under oath and testifying in this matter. This is not what's going to happen. You have waived your right to trial by jury. If this were then a court trial, there would be testimony presented by witnesses. We are not going to have that. There is going to be a recitation of facts by the State and I will then be the trier-of-fact and I will have to decide based upon the facts that are read into the record whether you are guilty or not guilty. Do you understand that that is what is going to happen?

DEFENDANT SHATZER: Yes sir.

THE COURT: And is that what you want to happen today?

DEFENDANT SHATZER: Yes sir.

THE COURT: All right. That's fine. Have a seat please. Not guilty plea is entered on count number two. Hear from the State.

MS. CIRINCION: May it please the Court. If called upon to do so the State would provide witnesses who would testify to the following - on the 20th of February 2006, Detective Steve Hoover of the Hagerstown City Police received a child abuse complaint. He then met with Brenda Lohman, social worker with the Washington County Department of Social Services,

and together they interviewed a victim by the name of Michael with the date of birth of October 9, 1997. He was currently living with his mother, his father is incarcerated pursuant to another victimization.

Ms. Swope brought her son to the Child Advocacy Center and Ms. Lohman conducted an interview of Michael, which was videotaped and viewed by both counsel.

Little Michael said that he was about six years old and the family was living on Summer Street, he walked through the dining room of his house on Summer Street and his father was standing there unclothed. His father told him to, quote, "Suck my private" and he told his father no. Then his father yelled at him so he said "I did it." He did perform fellatio on his father. He described or he actually demonstrated this with anatomical dolls, and indicated that this happened one time only and that afterward his father told him it was their secret.

Ms. Lohman and Detective Hoover then went to the Roxbury Correctional Institute and interviewed the defendant. He waived his rights per *Miranda* and agreed to speak with them. He denied that fellatio occurred. He did admit to masturbating in front of his son and he said his son was about three feet away from him but u'm he said his son never touched him. He did agree to a second interview with Detective Schultz and Detective Hoover. At that point, he started to cry and said "I didn't force him. I didn't force him." That is - - We would maintain that because of the age difference or rather because he is the actual father and custodian

at that time of this child in the spring of 2002, and that Michael described with particularity the crime of fellatio, we maintain that he committed sexual child abuse.

THE COURT: All right.

MR.. CREEDEN: If I may add for the record, that in July of 2003 Lieutenant - - Detective Blankenship went to the institution to interview Mr. Shatzer about this matter. That at that time Mr. Shatzer asked to have an attorney present. The interview stopped. In March of 2006, Detective Hoover who testified he did not know about the prior interview by Detective Blankenship, went to the institution, read Mr. Shatzer his *Miranda* rights, spoke to him. Then on March 7th, I believe Detective Schultz read him his *Miranda* rights and then there was a further interview. The matter that Detective Blankenship went to see Mr. Shatzer about was the same matter that Detective Hoover and Detective Schultz re-interviewed him about in 2006. And the basis for our suppression was that it violates the right to counsel and *Edwards* case. So I want to preserve that issue.

THE COURT: All right.

MR. CREEDEN: And finally, if the State has rested?

MS. CIRINCION: I think we've rested, yes.

MR. CREEDEN: I would make my motion for judgment of acquittal very briefly arguing that Mr.

Shatzer's statement basically sets forth a violation of perhaps perverted practice, indecent exposure type thing. It doesn't amount to the matter of child sexual abuse.

THE COURT: Does the State wish to be heard?

MS. CIRINCION: Very briefly your Honor. Sexual child abuse includes the exploitation of a child and clearly asking your, having - - forcing your son to perform fellatio on you is certainly an exploitation of this child and we believe that it is clearly covered under the statute.

THE COURT: Based upon the testimony that is presented in this case, there has been through proffer testimony of the child, Michael, who testified, would testify as to fellatio. There is further the admission of the defendant as to the act of masturbation. The Court finds that that is exploitation based on the version of events given. The Court finds beyond a reasonable doubt that the defendant is guilty of sexual child abuse of Michael Blaine Shatzer, Jr., occurring between January and the spring of 2002.

MS. CIRINCION: Thank you your Honor. It is my understanding that - - well sentencing is going to be delayed in this matter. A pre-sentence investigation was done when the defendant was convicted in 2002 and he's been incarcerated every since so we don't have, I don't think we have a need for pre-sentence investigation. What we - - And we have run the guidelines if you wish to see them. My understanding is primarily - - We are continuing this primarily to find

out what sentence of this man is going to mean vis-à-vis the child's 18th birthday. And so Mr. Creeden has proposed that we bring in witnesses from the parole commission. Mr. Shatzer is currently - - his current release date is in 2013. Michael doesn't turn 18 until October 2015. My - - The cap that the State is recommending is 10 years. We would not go over that cap, executed cap. However we advise that we would, we would come down some if we can guarantee that he will be incarcerated for that time.

It is also my understanding because it is not my practice ever to take a not guilty statement of facts or even an Alford plea in a case of this nature, that had we gone to trial, we would be going through the exact same appeal litany that we are going to go through in this case. And this way we were able to spare testimony in this case by doing this not guilty statement of facts. Understanding that for the public interest, truly this is an issue that needs to be decided by the Maryland Court of Appeals. That's all I have today.

MR. CREEDEN: Just add, your Honor, whether or not I can get someone from the parole commission, I certainly wanted to get Mr. Shatzer's classification counselor, together with his base file from RCI. The 12-year sentence he is currently serving is a violent crime. He has to serve at least half. And it's my impression that he really has no great chance of being paroled on that sentence. The only way he would be released on the 12-year sentence is through mandatory release and we need, I would seek to present testimony of people who may know better than we do to set that

to the Court and to satisfy the State.

THE COURT: All right I will delay sentencing in this matter. It will be reset within the next 60 days. And I'll give you enough lead-time so that you can subpoena the necessary witnesses for that hearing.

MR. CREEDEN: Thank you your Honor.

THE COURT: Yes sir. You are remanded to custody, Mr. Shatzer.

PROCEEDING ENDS AT 1:33 P.M.

I HEREBY CERTIFY that the proceedings in this matter of *State of Maryland v. Michael Blaine Shatzer, Sr.*, No. 21-K-06-37799, heard in the Circuit Court for Washington County, Maryland, on September 21, 2006, were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers 1 through 10 constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness whereof, I have affixed my signature this ___ day of January 2007.

_____

Tracy L. Zamora
Court Reporter

IN THE COURT OF APPEALS
OF MARYLAND

No. 124

September Term, 2007

Michael Blaine Shatzer, Sr.

v.

State of Maryland

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Raker, Irma S. (Retired, specially assigned)
Cathell, Dale, R. (Retired, specially assigned),

JJ.

Opinion by Raker, J.
Harrell and Cathell, JJ., Dissent.

Filed: August 26, 2008

We must decide whether the Circuit Court for Washington County erred in failing to suppress statements obtained from a defendant by the police in an interrogation that occurred two years and seven months after the defendant had requested the presence of an attorney during a prior interrogation for the same crime. In particular, we are asked to decide whether the prohibition against initiating further interrogation once a defendant invokes the right to counsel, as set forth in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), was interrupted by a break in custody such that the second interrogation did not violate the defendant's constitutional rights. We shall find that no break in custody occurred and that the *Edwards* rule applied.

I.

In August 2003, Brenda Lohman, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department, made a referral to the police department regarding a child, Michael Shatzer, Jr. The referral involved allegations that appellant, Michael Blaine Shatzer, Sr., committed sexual child abuse by ordering his three-year old son to perform fellatio on him. On August 7, Detective Shane Blankenship met with Shatzer to interview him about the investigation at the Maryland Correctional Institution - Hagerstown, where Shatzer was incarcerated on an unrelated offense involving sexual child abuse of a different child. Shatzer waived his *Miranda* rights, but after Detective Blankenship explained what he wanted to discuss, Shatzer invoked his *Miranda* rights and refused to talk

without the presence of an attorney; the interview was terminated. Detective Blankenship's written report stated that "When I [Blankenship] again attempted to initiate the interview, he [Shatzer] told me that he would not talk about this case without having an attorney present."

The police closed the investigation in 2003. In February 2006, Brenda Lohman filed a new referral when the child, now older, was able to make more specific allegations. Sergeant Kifer of the Hagerstown Police Department opened a new investigation. Kifer assigned Detective Paul Hoover to the new investigation because Detective Blankenship was on leave at the time the case was assigned.[1] Shatzer was still incarcerated within the general prison population, and was housed at the Roxbury Institute. Detective Hoover interviewed Shatzer at the Roxbury Institute on March 2, 2006, where Shatzer had been transferred. It is undisputed that Shatzer remained incarcerated in a Maryland Correctional facility during the entire interim period between the first interrogation in 2003 and the interview by Detective

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[1] At trial, Detective Hoover testified that he knew Detective Blankenship and saw him every day. Detective Blankenship testified that he had heard about the new investigation from Detective Hoover but did not recall whether he told Detective Hoover about Shatzer's previous request for an attorney in 2003. Detective Hoover knew about the prior investigation, but testified that he was not aware that Shatzer had previously requested an attorney.

Hoover in 2006.

At the March 2, 2006 interview, Shatzer expressed his surprise at the renewed questioning on the matter involving his son because Shatzer thought that the investigation had been closed. Detective Hoover explained that the Hagerstown Police Department had opened a new investigation on the same matter. Detective Hoover advised Shatzer of his *Miranda* rights and Shatzer signed the waiver form, waiving his right to an attorney and his right to remain silent. At no time did Shatzer indicate that he wished to talk with an attorney. Shatzer denied the fellatio allegation but did admit to masturbating in front of his son, from a distance of about three feet away. At the end of the half hour interview, Shatzer agreed to undergo a polygraph examination. On March 7, 2006, Shatzer was again informed of and waived his *Miranda* rights, and Detective Shawn Schultz administered the polygraph examination. Detective Schultz concluded that Shatzer failed the polygraph test. Detective Hoover then joined Detective Schultz in interviewing Shatzer. Shatzer became emotional, started to cry, and said "I didn't force him. I didn't force him." At that time, he requested an attorney and the interview stopped.

One June 16, 2006, the State's Attorney for Washington County filed in the Circuit Court for Washington County a statement of criminal information against Shatzer for the offenses of second degree sexual offense, sexual child abuse, second degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer filed

a motion to suppress the two statements taken by police at the March 2 and March 7, 2006, interrogations on the basis that Shatzer's prior request for counsel in the 2003 interrogation prevented further interrogation without the presence of an attorney, under the protections afforded by *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).[2]

The Circuit Court held an evidentiary hearing and denied Shatzer's motion to suppress the statements, rejecting his claim that the statements were obtained in violation of *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880. The trial court relied on *Clark v. State,* 140 Md. App. 540, 781 A.2d 913 (2001), *cert. denied,* 368 Md. 527, 796 A.2d 695(2002), in which the Court of Special Appeals held that a break in custody occurred that vitiated the *Edwards* prohibition on re-interrogation after the invocation of a defendant's right to counsel. The Circuit Court stated as follows:

> "[T]here was a break in custody for *Miranda* purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edwards,* that is, to not question

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[2] Defense counsel also filed a motion to suppress any in-court identification of the defendant, all evidence obtained from an alleged illegal search and seizure, a motion to sever the joint trial from any co-defendants and any other charges on unrelated crimes, a motion to dismiss the indictment. None of these motions are relevant to the question before us.

the defendant without having an attorney present once he asserts those rights, did not apply."

Shatzer waived his right to a jury trial and proceeded to trial before the court on a not guilty, agreed statement of facts.[3] The court found Shatzer

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[3] The factual predicate in the agreed statement of facts included a stipulation as to testimony from Brenda Lohman, the social worker with the Washington County Department of Social Services and a videotaped interview with the child, Michael, and the statements Shatzer made in the two interviews occurring on March 2 and March 7, 2006. The State's Attorney stated in relevant part as follows:

> "[Shatzer] denied that fellatio occurred. He did admit to masturbating in front of his son and he said his son was about three feet away from him but he said his son never touched him. He did agree to a second interview with Detective Shultz and Detective Hoover, At that point, he started to cry and said 'I didn't force him. I didn't force him.'"

The court, in finding Shatzer guilty, relied upon the statements made during the second set of interrogations, stating as follows:

> "There is . . . admission of the defendant as to the act of masturbation. The Court finds that that is exploitation based on the version of events given."

guilty of sexual child abuse.[4] Shatzer was sentenced to a term of incarceration for fifteen years, consecutive to any outstanding sentence, with all but five years suspended, followed by five years supervised probation.

Shatzer noted a timely appeal to the Court of Special Appeals. We granted certiorari on our own initiative to consider whether, under *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, the trial court erred in failing to suppress statements made nearly three years after appellant invoked his right to counsel and without appellant having been provided access to an attorney. *Shatzer v. State,* 403 Md. 304, 941 A.2d 1104 (2008).

II.

In reviewing a grant or denial of a motion to suppress evidence, we consider only the record from the suppression hearing. *Rush v. State,* 403 Md. 68, 82-83, 939 A.2d 689, 697(2008). The suppression court's findings of fact and the credibility of testimony are accepted unless clearly erroneous. *Id.* at 83, 939 A.2d at 697. We review the evidence and all inferences therefrom in the light most favorable to the prevailing party. *Id.* We make an independent, constitutional appraisal of the record by reviewing the law and

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[4] The State entered *a nolle prosequi* to the charge of second degree sexual offense and the court dismissed the two remaining misdemeanor charges as barred by the statute of limitations.

applying it to the facts of the case. *Id.*

III.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Supreme Court held that, in order to comply with the Fifth and Fourteenth Amendments' prohibition against self-incrimination, a defendant has the right to remain silent and the right to an attorney. *Id.* at 479, 86 S. Ct. at 1630. Significant for our purpose today, the Court made clear that if a defendant invokes his or her Fifth Amendment right to counsel, "the interrogation must cease until an attorney is present." *Id.* at 474, 86 S. Ct. at 1628. The clarity of the holding *in Miranda* created a bright-line rule for law enforcement agencies and courts. *Id.* at 441-42, 86 S. Ct. at 1610-11. *See also Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S. Ct. 3138, 3145, 82 L. Ed. 2d 317 (1984).

Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), clarified the scope of the protections afforded to a defendant who invokes his Fifth Amendment right to counsel. In *Edwards*, a defendant invoked his right to counsel, was re-interrogated by police the next morning, and at the second interrogation waived his *Miranda* rights. The Supreme Court held as follows:

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he

> has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Id. at 484-85, 101 S.Ct at 1884-85 (footnote omitted). Under *Edwards,* a suspect who expresses a desire to have counsel cannot be subject to further interrogation until counsel has been made available to him or her, unless the accused initiates further communication. The primary purposes of the *Edwards* rule are to ensure that any statement made in subsequent interrogation is not the result of coercive pressures, to prevent police from badgering a defendant, and to conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness. *See Minnick v. Mississippi,* 498 U.S. 146,150-51, 111 S. Ct. 486, 489, 112 L. Ed. 2d 489 (1990).

The Supreme Court, in *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100 L.E.2d 704 (1988), refused to create an exception to *Edwards* in a case where the police interrogated a suspect regarding an unrelated offense three days after a prior interrogation where the defendant invoked his right to counsel for a different crime. The Court held that it did not matter that the detective attempting the second interrogation was not aware of the prior invocation of right to counsel, and that the onus was on the police to check

the file and discover this fact. *Id.* at 687-88, 108 S. Ct. at 2101. The Court described *Edwards* as a bright-line, prophylactic rule, aimed as a corollary to *Miranda*. *Id.* at 680-82, 108 S. Ct. 2097-98. The "*per se* aspect of *Miranda*," which the Court said applied in equal force to the application of the *Edwards* rule, "was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation," making the right to the presence of an attorney "indispensable to the protection of the Fifth Amendment privilege." *Id.* at 682 n.4, 108 S. Ct. at 2098 n.4 (quoting *Fare v. Michael C.*, 442 U.S. 707,719, 99 S. Ct. 2560, 2568-69, 61 L. Ed. 2d 197 (1979)).

In *Roberson*, the Court distinguished between invoking the right to remain silent versus invoking the right to counsel, and stated that the protections afforded in the latter instance as follows:

> "As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation."

Id. at 683, 108 S. Ct. at 2099. The Court stated that any further interrogation without counsel would "surely exacerbate whatever compulsion to speak the suspect may be feeling." *Id.* at 686, 108 S. Ct. at 2100. Thus, the attempt of the police to obtain any

subsequent waiver is presumed to be "the product of the 'inherently compelling pressures'" unless counsel is provided. *Id.* at 681, 108 S. Ct. at 2097-98.

The Supreme Court refused again to relax the bright-line rule *of Edwards* in *Minnick v. Mississippi,* 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). In *Minnick,* the defendant invoked his right to counsel, and then had occasion to speak with an attorney two or three times over three days. When police initiated a second interrogation, however, counsel was not present. The Supreme Court held that *Edwards'* prohibition against further interrogation still applied, stating that "[w]hatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 153, 111 S. Ct. at 491. Justice Scalia dissented, calling the *Edwards'* prohibition against further interrogation "perpetual" as a result of the court's decision:

> "'Perpetuality' is not too strong a term, since, although the Court rejects one logical moment at which the Edwards presumption might end, it suggests no alternative . . . the result would presumably be the same if [the second interrogation] had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well."

Id. at 163, 111 S. Ct. at 496.

In May of 1992, the United States Supreme Court granted certiorari to hear arguments in *United States v. Green,* 592 A.2d 985 (D.C. 1991), *cert. granted,* 504 U.S. 908, 112 S . Ct. 1935, 118 L. Ed. 2d 542 (May 18, 1992). In *Green,* the District of Columbia Court of Appeals affirmed the trial court's suppression of a murder confession obtained by a police interrogation conducted after the defendant had invoked his right to counsel in an unrelated matter. The original arrest involved drug charges and occurred on July 18, 1989. Green invoked his right to counsel and interrogation ceased. Green was remanded to the custody of juvenile authorities and pled guilty to attempted possession with intent to distribute cocaine. He was transported to the Youth Center at the Lorton Reformatory prior to sentencing. On January 4, 1990, Green was charged with murder in an unrelated crime and was brought to the police station the next day for booking. At that time, he waived his Miranda rights and confessed to the murder.

Green filed a motion to suppress the confession, arguing that the second interrogation violated the protections *of Edwards.* The trial court denied the motion to suppress initially, citing the five month lapse of time between the interrogations, the less coercive environment where the defendant was held, the appointment of counsel and opportunity to consult with an attorney in between the two interrogations. The trial court reconsidered and reversed its ruling after the Supreme Court decided *Minnick v. Mississippi,* because *Minnick* made clear that the

interim availability of counsel did not provide a break from *Edwards* protections, and that factor was the most significant reason for denying Green's motion to suppress. *Id.* at 986.

The District of Columbia Court of Appeals affirmed the suppression of the statement. In response to the argument that the case could be factually distinguished from Supreme Court precedent, the court noted as follows:

> "[I]f *Edwards, Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel . . . . The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' 'bright-line, prophylactic . . . rule,' we are not convinced that in combination the Court would regard these two factors differently."

Id. at 988. Regarding the government's argument that the sheer lapse in time between the two interrogations should alleviate the *Edwards* protections, the court noted arguments on both sides of the issue, but held as follows:

> "Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month

> interval . . . is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards'* command."

Id. at 989-90.[5] The District of Columbia Court of Appeals articulated the problems with allowing *Edwards* protections to expire "based on the sheer length of time" between interrogations. *Id.* at 988. The court said as follows:

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[5] In *United States v. Green*, 592 A.2d 985 (D.C. 1991), the issue of continuous custody was not before the District of Columbia Court of Appeals, because, as the Court said, "the government concedes on appeal 'that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule.'" *Id.* at 988. The Court also noted that "[s]trictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder." *Id.* at 990 n.8.

> "In *Minnick,* although the relevant interval was only a matter of days, the [United States Supreme] Court emphasized 'the coercive pressures that accompany custody and that may *increase* as custody is prolonged.' . . . . Hence there is nothing in the lapse of time itself from which to deduce that [a defendant's] belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the . . . offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.
>
> . . . . If five months in custody without evidence of police 'badgering' is held sufficient to dispel *Edwards'* presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time — and in conjunction with what other circumstances — does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part?"

Id. at 989 (internal citation omitted) (emphasis in original). In addition, the court rejected the government's third argument for relaxing the *Edwards* prohibition, that the defendant's pleading guilty to the first offense "'reopened the dialogue with the authorities' within the meaning of *Edwards.*" *Id.* at 990. The court reasoned that since the plea was entered with the advice and assistance of counsel, it

did not represent the "pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own." *Id.* at 991.

The United States Supreme Court granted certiorari to consider the arguments in *Green* on May 18, 1992. *United States v. Green,* 504 U.S. 908, 112 S. Ct. 1935, 118 L. Ed.2d 542 (1992). The Court heard oral arguments on November 30, 1992, but before the Court issued an opinion, Green died in prison and the Supreme Court dismissed the petition. *United States v. Green,* 507 U.S. 545, 113 S. Ct. 1835, 123 L. Ed. 2d 260 (1993). Since the dismissal in *Green,* the Supreme Court has not granted certiorari to consider potential expiration-triggering events of the protections afforded in *Edwards,* nor has it ruled that a break in custody terminates the presumption of *Edwards*. *See Eugene Shapiro, Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 11 (2000)(noting that "[t]here is a certain quality to *Edwards v. Arizona* and its progeny that discourages predictions about their future development"). "Rather, a fleeting reference to continuous custody in *dictum* in *McNeil v. Wisconsin* is sometimes cited as an indication of the Court's view of the issue." *Id.* at 22.

In *McNeil v. Wilson,* 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), the United States Supreme Court found that the defendant invoked his Sixth Amendment, rather than his Fifth Amendment right to counsel, and thus *Miranda* issues were not implicated. While the issue of *Edwards* protections was not central to the disposition of the case, nonetheless

Justice Scalia, writing for the majority, described the *Edwards* protection as providing as follows:

> "Once a suspect asserts the right [to counsel], not only must the current interrogation cease, but he may not be approached for further interrogation 'until counsel has been made available to him,' — which means, we have most recently held, that counsel must be present. If the police do subsequently initiate an encounter in the absence of counsel *(assuming there has been no break in custody)*, the suspect's statements are presumed involuntary and therefore inadmissible at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards."

Id. at 176-77, 111 S. Ct. at 2208 (emphasis added) (citations omitted). Subsequently, many courts have found that a break in custody exception exists to the *Edwards* rule, where the defendant was released from custody in the interim.[6]

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[6] *See, e.g., United States v. Harris,* 221 F.3d 1048, 1052 (8th Cir. 2000) *(Edwards* does not apply where the concern of police badgering "is not present in cases such as this . . . where a person is not in continuous custody and the coercive effects of confinement dissolve"); *Kyger v. Carlton,* 146 F.3d 374, 380 (6th Cir. 1998) *("Edwards* does not, however, apply to suspects who, like Kyger, are not in continuous custody"); *United States v. Barlow,* 41 F.3d 935, 945

(continued...)

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[6](...continued)
(5th Cir. 1994), *cert. denied,* 514 U.S. 1030, 115 S. Ct. 1389, 131 L. Ed. 2d 241 (1995); *United States v. Hines,* 963 F.2d 255, 257 (9th Cir. 1992); *In re Bonnie H.,* 65 Cal. Rptr.2d 513, 526 (Cal. Ct. App. 1997); *Keys v. State,* 606 So.2d 669, 672 (Fla. Dist. Ct. App. 1992); *State v. Alley,* 841 A.2d 803, 809 (Me. 2004); *Commonwealth v. Galford,* 597 N.E.2d, 410, 414 (Mass. 1992); *Willie v. State,* 585 So.2d 660, 666 (Miss. 1991); *State v. Harrison,* 213 S.W.3d 58 (Mo. Ct. App. 2006); *State v. Farris,* 125 S.W.3d 365, 371 (Mo. Ct. App. 2004); *Commonwealth v. Wyatt,* 688 A.2d 710, 712-13 (Pa. Super. Ct. 1997).

Many federal and state courts limited the scope of *Edwards* to continuous custody cases prior to the break in custody exception hinted at in *McNeil v. Wilson*, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). The seminal case is *United States v. Skinner,* 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied,* 463 U.S. 1229, 103 S. Ct. 3569, 77 L. Ed. 2d 1410 (1983) (holding *Edwards* did not apply because "[w]hen Skinner left the station that afternoon, he had the opportunity to contact a lawyer or to seek advice from friends and family if he chose to do so"). *See also Dunkins v. Thigpen,* 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied,* 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989); *McFadden v. Garraghty,* 820 F.2d 654, 661 (4th Cir. 1987); *United States ex rel. Espinoza v. Fairman,* 813 F.2d 117, 124 (7th Cir. 1987); *United States v. Geittmann,* 733 F.2d 1419, 1425 (10th Cir. 1984); *People v. Trujillo,* 773 P.2d 1086, 1091-92 (Colo.
(continued...)

A few jurisdictions have found a break in custody where a defendant, after invoking the right to counsel during interrogation for one offense, was convicted and sentenced for that offense, and subsequently was interrogated for a second, unrelated offense while incarcerated.[7]

In Maryland, this Court addressed whether a defendant's *Edwards* protections were violated after he invoked his right to counsel in *Blake v. State,* 381 Md.

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[6](...continued)
1989); *State v. Bymes,* 375 S.E.2d 41, 41-42 (Ga. 1989); *State v. Norris,* 768 P.2d 296, 301-03 (Kan. 1989); *In re Wells,* 532 So.2d 191, 196 (La. Ct. App. 1988); *Brown v. State,* 661 P.2d 1024, 1029-30 (Wyo. 1983).

[7] *See, e.g., Isaacs v. Head,* 300 F.3d 1232, 1263 (11th Cir. 2002) (finding the protections of *Edwards* do not apply "to a defendant in Isaacs' position — one who has already been tried and convicted of the crime for which he was taken into custody and with respect to which he asserted a right to counsel"). *See also United States v. Arrington,* 215 F.3d 855, 856-57 (8th Cir. 2000) (stating that "we find no support in *Edwards* or *Roberson* for *Arrington's* contention that the right [to counsel] 'continues *ad infinitum,*' and certainly not where, as here, the accused has entered a guilty plea and has begun serving his sentence" and stating that after pleading guilty and being transferred "from police custody to correctional custody to serve his sentence" he was "no longer 'in custody' as that term has been used in the context *of Edwards* and *Roberson").*

218, 849 A.2d 410 (2004). Blake, a seventeen-year old male, was arrested at 4:30 a.m. in connection with a murder. During interrogation, he invoked his right to counsel. The police officers put Blake, who was dressed in only boxers and a tank top and was without shoes, in a holding cell and returned a half hour later to give Blake a copy of the arrest warrant and statement of charges indicating that the penalty he was facing was "DEATH."[8] One of the officers then said "I bet you want to talk now, huh!" When the police returned to Blake's cell a half an hour later to give Blake some clothing, Blake asked if he could talk to police, and he then waived his *Miranda* rights.

Blake filed a pre-trial motion to suppress the incriminating statements he made to the police. The trial court granted the defendant's motion to suppress the subsequent statements, reasoning that they were taken in violation *of Edwards*. The State noted a timely appeal, and the Court of Special Appeals reversed. This Court granted certiorari and reversed the Court of Special Appeals, holding that where the police actions "amounted to the functional equivalent of interrogation, thereby violating petitioner's rights," the trial court properly suppressed subsequent statements. *Id.* at 222, 849 A.2d at 412. We held that

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[8] The statement of charges included an incorrect assertion that the penalty for first degree murder was "DEATH," even though petitioner was not eligible for the death penalty. *See* Md. Code (2002, 2003 Cum. Supp.), § 2-202(b)(2)(1) of the Criminal Law Article.

under such circumstances, Blake's question of whether he could talk to the police related to "routine incidents of the custodial relationship" and did not serve to "'initiate' a conversation in the sense in which that word was used in *Edwards.*" *Id.* at 237, 849 A.2d at 421 (quoting *Oregon v. Bradshaw,* 462 U.S. 1039, 1045-46, 103 S. Ct. 2830, 2835, 77 L. Ed. 2d 405 (1983)). Finally, we observed that "[t]here was no break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissive interrogation." *Id.* at 239, 849 A.2d at 422. The United States Supreme Court granted certiorari in April 2005, *Maryland v. Blake,* 544 U.S. 973, 125 S. Ct. 1823, 161 L. Ed. 2d 722 (2005), heard oral arguments on November 1, 2005, and then dismissed the petition two weeks later as improvidently granted. *Maryland v. Blake,* 546 U.S. 72, 126 S. Ct. 602, 163 L. Ed. 2d 406 (2005).

While no other case has addressed the *Edwards* issue in this Court since *Blake,* the Court of Special Appeals in *Clark v. State,* 140 Md. App. 540, 981 A.2d 913 (2001), *cert denied,* 368 Md. 527, 796 A.2d 695 (2002), held that a five-year lapse between interrogations, between which the defendant pled guilty and was sentenced for the crime involved in the first interrogation, constituted a break in custody sufficient to serve as an exception to *Edwards.* The court said that the "five plus years appellant spent in prison after invoking his right to counsel constituted a break in custody." *Id.* at 600, 781 A.2d at 948.

IV.

Appellant argues that *Edwards* is controlling, because it creates a bright-line rule that a suspect who has requested counsel may not be subjected to further interrogation unless counsel has been made available or the suspect himself has initiated further communication. Appellant maintains that these protections must continue to be honored, irrespective of any break in custody or passage of time. He contends that a police officer reopening an investigation is obligated to become familiar with police reports related to prior questioning, and any ignorance as to the suspect's prior request for counsel should not excuse a failure to honor that request. Appellant further argues that, because there had never been a prosecution following the first investigation, the coercive pressures *Miranda* was intended to dispel remained present, and the second interrogation amounted to badgering the appellant in the manner the *Edwards* prophylactic was intended to prevent. Appellant argues that even assuming *arguendo* that some break in custody exception to *Edwards* exists, a break in custody exception should not be recognized in this case, where he was continuously held in custody in between the interrogations.

The State argues that, because the purpose of the *Edwards* protections is to prevent police from badgering a suspect into abandoning his right to counsel, the suspect's *Edwards* protections ought to expire following either a break in custody or a substantial passage of time sufficient to diminish this concern. In furtherance of its break-in-custody argument, the State advocates a distinction between police custody and correctional custody. The State

contends, in other words, that the suspect is no longer in "custody" once he is released back into a prison's general population. Furthermore, the State argues that the passage of more than two and a half years following the appellant's request for counsel vitiates the concern regarding police badgering which is the underlying rationale for *Edwards*.

V.

A.

Commentators and courts have been struggling with how to resolve the question of whether the protective rule of *Edwards* has remained fixed or whether the protection announced by *Edwards* ever ends. Finding it unacceptable that a suspect is forever immunized from all police-initiated custodial interrogation, some courts have held that the passage of time, a break in custody or the disposition of the case originally under investigation of the underlying investigation/case terminates the *Edwards* protections.

We address first the contention that a lapse in time may cause the protections of *Edwards* to expire. We are in accord with the reasoning of the District of Columbia Court of Appeals in *Green,* that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered . . . ." *Green,* 592 A.2d at 989. When the United States Supreme Court granted certiorari in *Green,* the topic of a lapse-of-time expiration to *Edwards* was discussed expressly during oral argument. After the Court questioned petitioner's counsel, the Deputy Solicitor General, as to whether

his argument was that "there has been a sufficient passage of time to justify going back to him contrary to *Edwards* or that *Edwards* just wears out after 2 or 3 months?", the following questioning by Justice O'Connor took place:

> "[THE COURT]: Well, it isn't clear to me what you would say. Suppose he had remained in custody and it had been 3 months and the police hadn't asked him anything and no guilty plea Now, is that enough?
>
> [COUNSEL FOR PETITIONER]: Yes, it is, and —
>
> [THE COURT]: 2 months?
>
> [COUNSEL FOR PETITIONER]: 2 months is enough and —
>
> [THE COURT]: 1 month?
>
> [COUNSEL FOR PETITIONER]: 1 month is enough.
>
> [THE COURT]: 2 days?
>
> [COUNSEL FOR PETITIONER]: 2 days is probably not enough. Now, it isn't a bright line.
>
> [THE COURT]: It isn't even a line, is it?"

Transcript of Oral Argument at *15, *United States v. Green*, No. 91-1521, 1992 U.S. Trans LEXIS 142 (Nov.

30, 1992). The Supreme Court did not, however, unanimously support the reasonableness of *Edwards'* protections extending in perpetuity. The following exchange occurred also between the Court and respondent's counsel:

> "[THE COURT]: Well, do you think Edwards has no time limits at all?
>
> [COUNSEL FOR RESPONDENT]: That's correct.
>
> [THE COURT]: None.
>
> [COUNSEL FOR RESPONDENT]: No, and —
>
> [THE COURT]: So, if the defendant is sentenced, let's say, to a life sentence in connection with the drug charge, at no time then would the Government ever be able to go back and ask him if he had waived — give him his Miranda rights and talk to him about the murder."

Id. at *25.

Since *Green,* debate continues over whether the protections *of Edwards* may expire with time. In *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990), for example, the United States Court of Appeals for the Sixth Circuit held that *Edwards* and *Roberson* did not invalidate a Fifth Amendment waiver of the right to counsel when a defendant had asked for and received appointed counsel on an unrelated charge, and a significant amount of time had passed before the

second police interrogation on the new charge.[9] Judge Smith, writing for the court, stated that "neither *Edwards* nor *Roberson* can be interpreted within this appeal to grant to Hall such a blanket protection continuing *ad infinitum.*" *Id.* at 963. The concurring opinions, however, followed different reasoning. Judge Ryan concurred in the judgment, but on the grounds that Hall had invoked only his Sixth Amendment right to counsel. Judge Kennedy concurred also in the judgment, because he believed the admission of the statements at trial was harmless error, but wrote separately because in his view, *Roberson* applied. Judge Kennedy argued that "[t]he fact that he had been in custody for a substantial length of time may or may not have increased the 'pressures of custodial interrogation,'" and that the bright-line rule still applied. *Id.*

The issue of whether the passage of time could terminate the protections of *Edwards* remains an open question. *See, e.g., Eugene Shapiro, Thinking the*

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[9] *United States v. Hall*, 905 F.2d 959 (6th Cir. 1990), predated *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990). It is not clear whether the court's reliance in *Hall* on the availability and opportunity to consult with appointed counsel prior to the second interrogation is viable after *Minnick*. *See Minnick*, 498 U.S. at 151-53, 111 S. Ct. at 490-91 (holding that the opportunity to consult with counsel between interrogations was insufficient, and that *Edwards* requires the presence of counsel at the second interrogation).

Unthinkable: Recasting the Presumption of Edwards v. Arizona, 53 Okla. L. Rev. 11, 25 (2000) ("The passage of time . . . . issue remains open and the Court might well modify the current doctrine. Such a modification would of course require the generalization that, in fact, a protected suspect's need is not a 'perpetual' one . . . . As the duration involved lengthens, debate about the influence of time upon a suspect's helplessness is likely to decrease.")

Nonetheless, allowing *Edwards* to expire poses difficult questions. One scholar who advocates imposing limits on the protections of *Edwards*, recognizes that while allowing Edwards protections to expire with the passage of time may have significant merit, "the passage of time, by itself, should not be enough to eradicate the suspect's *Edwards* rights." *Marcy Strauss, Reinterrogation,* 22 Hastings Const. L.Q. 359, 397 (1995). The author goes on to state as follows:

> "While the need for a bright-line rule should not be overstated, it seems to have a special poignancy here. How is a court — or a police officer in the first instance — to draw the line and determine how long is long enough? . . . . To the extent one errs, making the time interval too short, the fear of badgering and coercing confessions in violation of the Fifth Amendment becomes all too real."

Id. Although several courts from other jurisdictions suggest that the passage of time could be a factor to cause *Edwards* protections to expire, our research

revealed no case that relies *solely* upon the passage of time factor standing alone.[10]

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[10] Many courts have used the length of time between interrogations as one relevant factor in considering whether a break in custody exists. *See, e.g., Hill v. Brigano,* 199 F.3d 833, 842 (6th Cir.1999) ("Taking into account both the time lapse between the impermissible interrogation and the incriminating statements by the defendant and the fact that the defendant was aware that he had been assigned counsel, we believe the trial court was correct in analyzing the admissibility of this evidence under the initiation exception to *Edwards"), cert. denied,* 529 U.S. 1134, 120 S. Ct. 2015, 146 L. Ed. 2d 964 (2000); *Perrine v. State,* 919 So.2d 520, 524-25 (Fla. Dist. Ct. App. 2005) (stating that since *"either* a break in custody or a lapse of time may be sufficient to obviate the effect of improper police interrogation," the combination of those two factors served to expire *Edwards* protections). Other courts have suggested in *dicta* that a lapse in time would vitiate *Edwards* protections. *See, e.g., Holman v. Kenna,* 212 F.3d 413, 419 (8th Cir. 2000) (stating in *dicta* that "[o]ther circuits have noted that various factors such as a break in custody or a lapse in time may vitiate the coercive effect of an impermissible interrogation so that the admission of subsequent statements is not barred by the *Edwards* rule. We do not believe these circumstances to be exhaustive and think that other scenarios may also militate against the finding of an *Edwards* violation") (citations omitted); *United States*

(continued...)

In light of the Supreme Court's ultimate inability to rule on the questions addressed in *Green,* we hold that the passage of time *alone* is insufficient to expire the protections afforded by *Edwards.* To hold otherwise would create a tenuous slippery slope, whereby the protections against the coercive pressures of interrogation expire after an indeterminate time period has passed. As the District of Columbia court aptly noted in *Green:* "If five months . . . is held sufficient to dispel *Edwards'* presumption that any new waiver of rights is involuntary, then why not three months or three weeks?" *Green,* 592 A.2d at 989. We think that the fact-based analysis such a rule would require would run contrary to the bright-line rule established in *Edwards* and the purpose of *Edwards.* Allowing a lapse of time, standing alone, as the sole factor that terminates the protection against reinterrogation without counsel, would undermine the established rule, that an accused "is not subject to further interrogation" unless either counsel has been made available or "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards,* 451 U.S. at 484-85, 101 S. Ct. at 1885. Without further guidance from the Supreme Court, we adhere to the bright-line rule that without either of these two exceptions, *Edwards*

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[10](...continued)
v. Gomez, 927 F.2d 1530, 1539 n.8 (11th Cir.1991) (suggesting but not deciding that"[i]t maybe possible for enough time to elapse between the impermissible further interrogation and the 'initiation' that the coercive effect of the interrogation will have subsided").

protections continue. *See also Kochutin v. State,* 813 P.2d 298, 304 (Alaska Ct. App. 1991), *vacated on other grounds,* 875 P.2d 778 (Ala. App. 1994) ("we find nothing in *Edwards* or in subsequent decisions of the Supreme Court to indicate that *Edwards* should be relaxed by the mere passage of time").

B.

We next address appellee's contention that we should recognize a break in custody exception to the *Edwards* rule. Recognition of such an exception would cause the protections of the bright-line rule in *Edwards to* expire whenever a break in custody occurs between the original invocation of counsel and the second interrogation. We decline to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption, because even assuming *arguendo* that a break in custody would do so, under the facts of this case, the only event that may support a break in custody was Shatzer's release back into the general prison population in between the two police interrogations. In our view, a suspect who remains in continuous government custody or incarceration remains in custody for *Edwards* purposes, particularly where, as here, the second interrogation regards the same underlying crime as the first interrogation involved.

Many courts have held that a break in custody may serve to expire the protections afforded by the rule in *Edwards. See, e.g., Elizabeth Levy, Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards,* 20 New Eng.J. on Crim &

Civ. Confinement 539,569 (1994) ("The courts have unanimously declined to extend the holding in *Minnick* to non-continuous custody cases"); *Strauss, Reinterrogation*, 22 Hastings Const. L.Q. 359, 386 (1995) ("Virtually every court that has considered this issue has held (or noted in *dicta)* that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver"). *See also Kyger v. Carlton,* 146 F.3d 374, 380 (6th Cir. 1998) ("We hold that *Edwards* does not, however, apply to suspects who, like Kyger, are not in continuous custody. Although this is an issue of first impression in this circuit, we note that other courts have unanimously reached this conclusion"); *State v. Scanlon,* 719 N.W.2d 674, 682 (Minn. 2006) ("[M]any state and federal courts have held that a break in custody defeats the *Edwards* rule"); cases cited at n.6, *supra.* The United States Court of Appeals for the First Circuit explained the rational behind the break in custody exception in *Kyger v. Carlton* as follows:

> "*Minnick* was in continuous custody, and resisted efforts to make him answer questions. *Id.* at 154. Kyger, by contrast, was not in jail. He was subject to periodic questioning — some custodial and some not custodial, but never under improper pressure — every two or three days. He had ample time during that period to consult with an attorney if he so desired. The concern of *Edwards* — coercive questioning by the government that deprives a suspect of the benefits of the counsel he has requested — simply is not implicated when a suspect is not in continuous custody."

Kyger, 146 F.3 d at 381.

Nonetheless, debate continues about the legitimacy and rationale behind recognizing a break in custody exception to *Edwards*. The Court of Special Appeals in *Clark v. State*, 140 Md. App. 540, 586, 781 A.2d 913, 940 (2001) noted that "[s]ince *Minnick*, there has been considerable discussion and disagreement among legal scholars as to whether there are, or at least should be, any exceptions to the seemingly 'bright-line' *Edwards* rule." The United States Supreme Court highlighted concerns about the stage at which a break in custody exception might apply to *Edwards* during the oral arguments in *Green*. The District of Columbia's primary argument in the case was as follows:

> "[T]hat the guilty plea is a dramatic change in circumstances that justifies lifting the *[Edwards]* presumption. This Court has never had occasion to consider whether the *Edwards* presumption continues in the face of a guilty verdict, let alone a guilty plea. In *Edwards*, in *Roberson*, and in *Minnick*, the subject was in the same position when he invoked his right to counsel as when the police reinitiated questioning, a pretrial suspect. Here, however, in the meantime, the respondent has been found guilty on the matter that led to his arrest and on which he — which triggered his *Miranda* rights in the first place."

Transcript of Oral Argument at *3, *United States v. Green*, No. 91-1521, 1992 U.S. Trans LEXIS 142 (Nov. 30,1992). The United States Supreme Court posited "whether the cutoff time might not be the sentencing

on the drug charge rather than the entry of the plea." *Id.* at *7-8. Thus, the focus of the Supreme Court's concern was whether a guilty plea or conviction on the charge that led to the first interrogation was a relevant intervening event that might cause *Edwards* protections to expire with respect to a second interrogation on an unrelated crime. Notably, the Supreme Court asked, regarding the time between the two interrogations, "Well, he had been in custody all this time, hadn't he?", to which the counsel for petitioner acknowledged "He had been in custody." *Id.* at *5.

Despite the debate about the legitimacy of recognizing a break in custody exception to *Edwards,* we need not enter the foray in this case where, as here, Shatzer was held in continuous custody as an incarcerated . prisoner during the interim period between interrogations regarding the same subject matter. The basis for the break in custody exception recognized in other courts is typically where a defendant was released from custodial interrogation into society. *See, e.g., Kyger,* 146 F.3d at 380-81 (Kyger was questioned several times within a ten day period but was not "in continuous custody" during that time); *Scanlon, 719* N.W.2d at 683 (finding there was a break in custody where "there were months between Scanlon's invocation of his right to counsel and his subsequent statements — months in which he was not in custody. By any standard, Scanlon was therefore sufficiently 'out of custody' for his *Edwards* invocation to be nullified").

Of the few courts addressing *Edwards* in continuous

incarceration situations, the reasoning behind the break in custody relies in large part on an intervening guilty plea or sentencing, the two possible relevant events identified by the Supreme Court during oral arguments in *Green,* rather than relying solely on a release into general prison population as a sufficient break in custody. The United States Court of Appeals for the Eleventh Circuit in *Isaacs v. Head,* 300 F.3d 1232, 1263 (11th Cir. 2002), framed the question as whether *Edwards* protections "do not extend to a defendant in Isaacs' position — one who has already been tried and convicted of the crime for which he was taken into custody and with respect to which he asserted a right to counsel" and, again, "whether *Edwards* protections continue to apply to a prisoner who is in custody following conviction for the crime for which he or she initially asserted the right to deal with the police only through counsel." In holding that a break in custody ended Isaacs' question-proof status, the court based its decision in large part on the approach that "*Edwards* does not apply to a defendant *who has been convicted* and who remains in custody only in the sense that he is incarcerated as part of the general prison population." *Id.* at 1266 (emphasis added). Thus, the court considered it relevant that the prior interrogation involving the invocation of counsel occurred prior to conviction. Similarly, the United States Court of Appeals for the Eighth Circuit in *United States v. Arrington,* 215 F.3d 855, 856 (8th Cir. 2000), held that *Edwards* protections do not continue indefinitely, and "certainly not where, as here, the accused has entered a guilty plea and has begun serving his sentence."

Isaacs and *Arrington* are factually distinguishable from the case at bar in that they involve the invocation of the right to counsel on the original charge, followed by a conviction and sentencing on that charge, and then subsequent interrogation on a new crime while incarcerated on the first charge. The Court of Special Appeals found these distinctions relevant in *Clark,* where the court noted both the length of time that had passed and "the fact that, after counsel was requested, [Clark] pled guilty to the . . . murder . . . ." *Clark,* 140 Md. App. at 598-99, 781 A.2d at 947. The court framed the inquiry in *Clark* as follows:

> "Inasmuch as there is a universally recognized 'break-in-custody' exception to *Edwards,* the question becomes whether there has been a 'break in custody' when a suspect invokes his right to counsel, but later pleads guilty, is sentenced, and is serving that sentence in prison prior to reinterrogation by the police."

Id. at 589-90, 781 A.2d at 942. By contrast, in the case *sub judice,* Shatzer's two interrogations were separated *solely* by time; they involved the same underlying investigation and he did not enter a plea nor was he sentenced in the interim.

Nevertheless, the *Isaacs* and *Arrington* courts both viewed incarceration within general prison population insufficient to serve as custody for the purposes of the *Edwards* rule. The Eleventh Circuit in *Isaacs* found that "incarceration in prison is not necessarily the same as '*Miranda* custody,'" and maintained that incarceration "is the accustomed milieu for many

inmates, rather than the type of coercive situation that was the source of concern in *Miranda* and its progeny." *Isaacs*, 300 F.3d at 1267. In *Arrington*, the defendant was transferred "from police custody to correctional custody to serve his sentence" and thus the court found that he was "no longer 'in custody' as that term has been used in the context of *Edwards* and *Roberson*." *Arrington*, 215 F.3d at 856.

While *Arrington* and *Isaacs* are in keeping with the majority view that prison does not constitute *per se* custody for *Miranda* purposes without the finding of some additional restraint,[11] several jurisdictions and scholars express a contrary view. *See, e.g., United States v. Redfield*, 402 F.2d 454, 455 (4th Cir. 1968) (per curiam) (prohibiting the use of statements at trial that were obtained when a prison warden questioned an inmate without giving proper *Miranda* warnings); *People v. Woodberry, 71* Cal.Rptr. 165, 168 (1968) (finding a confession obtained from an inmate *without Miranda* warnings must be suppressed); *People v. Faulkner*, 282 N.W.2d 377, 379 (Mich. Ct. App. 1979); *Blyden v. Hogan*, 320 F.Supp. 513, 519 (S.D.N.Y.1970) (granting a preliminary injunction in a class action by inmates in a city jail who were not given *Miranda* warnings before questioning, since "the plaintiffs here

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[11] *See Laurie Magid, Questioning the Question-Proof Inmate*, 58 Ohio St. L.J. 883, 935 & n.174 (1997) ("[a]fter *Mathis*, numerous state and lower courts expressly held that not all incarceration constitutes *Miranda* custody and that 'incarceration does not *ipso facto* render an interrogation custodial'").

are clearly in custody"); *State v. LaRue,* 578 P.2d 66, 69 (Wash. Ct. App. 1978); *Inmates of Attica Correctional Facility v. Rockefeller,* 404 U.S. 809, 92 S. Ct. 35, 30 L. Ed.2d 40 (1971) (Douglas, J., dissenting); *Lederer, Miranda v. Arizona The Law Today, 78* Mil.L.Rev. 107, 129 n. 82 (1978); *Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.Car.L.Rev. 699,725-28 (1974). The view that incarceration is *per se* custody originates from a broad reading of *Mathis v. United States,* 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968), in which the Supreme Court, regarding the questioning of an inmate in incarceration, said as follows:

> "The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is 'in custody' in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."

Id. at 4-5, 88 S. Ct. at 1505. Other jurisdictions do not interpret *Mathis* so broadly, but recognize that "[t]he question whether a suspect incarcerated on an unrelated offense is *de facto* in custody for all *Miranda* purposes has not been directly addressed by the U.S. Supreme Court." *State v. Tibiatowski,* 590 N.W.2d 305,

309 (Minn. 1999). The United States Court of Appeals for the Eighth Circuit, in *United States v. Chamberlain,* 163 F.3d 499 (8th Cir. 1998), stressed the importance of considering incarceration in the determination of custody, stating as follows:

> "The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody. That inquiry must include consideration of the fact of incarceration. The Supreme Court has indicated that when the individual being questioned is already in prison, '[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that . . . will weaken the suspect's will.' *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S. Ct. 2394, [2397,] 110 L. Ed. 2d 243 (1990)."

Id. at 502 (citation omitted).

This Court has declined to reach the question of whether incarceration is *per se* custody. *See Whitfield v. State,* 287 Md. 124, 411 A.2d 415 (1980). In *Whitfield,* the question was whether a prisoner questioned by correctional officers about the presence of a gun within the jail was subject to custodial interrogation for purposes of *Miranda,* and whether an emergency exception *to Miranda* exists.[12] We noted

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[12] In *Whitfield v. State,* 287 Md. 124, 133, 411 A.2d 415, 421 (1980).declined to recognize an

(continued...)

that "[w]hile a few courts have been willing to interpret *Mathis* in this broad fashion that prison confinement equals custody, we find that it is unnecessary to do so here since under the general test to be utilized in deciding when one is in 'custody,' which we announce today, it is clear that Whitfield was 'deprived of his freedom of action' in the *Miranda* sense at the time of questioning, without regard to the fact that he was otherwise incarcerated when it occurred." *Id.* at 139, 411 A.2d at 424 (citations omitted). Regarding the determination of whether the defendant was in custody, we noted the consideration of the following factors:

> "[T]hose facts intrinsic to the interrogation: when and where it occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or as a witness. Facts pertaining to

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[12](...continued)
emergency exception to Miranda, noting that "the United States Supreme Court itself has not placed any per se limitation on where and *when Miranda* safeguards should be applied." The Supreme Court subsequently recognized an emergency exception *in N.Y. v. Quarles*, 467 U.S. 649, 104 S. Ct 2626, 81 L. Ed. 2d 550 (1984), implicitly overruling this portion of *Whitfield*.

> events before the interrogation are also relevant, especially how the defendant got to the place of questioning whether he came completely on his own, in response to a police request or escorted by police officers. Finally, what happened after the interrogation whether the defendant left freely, was detained or arrested may assist the court in determining whether the defendant, as a reasonable person, would have felt free to break off the questioning."

Id. at 141, 411 A.2d at 425 (citation omitted).

The *Whitfield* test for custody related to determining whether custody existed for *Miranda* purposes. The *Edwards* rule, however, comes into effect with the presumption that two custodial interrogations exist, during which the suspect was in custody for interrogation purposes. Any "break in custody" exception to *Edwards,* then, must mean something different than the test for determining custody for purposes of *Miranda* warnings. This Court, in discussing the difficulty of establishing what constitutes custody, has said that custody is "typically associated with formal arrest or incarceration . . . ." *Owens v. State,* 399 Md. 388, 428, 924 A.2d 1072, 1095 (2007). To determine whether continuous incarceration and a suspect's return to general prison population should be recognized as a break in custody that alleviates the need to comply with the *Edwards* rule, the more appropriate view of custody, for *Edwards* purposes, should be a test on the freedom of movement of the individual and whether the suspect had a meaningful opportunity to secure counsel.

In Maryland, we have held that home detention constitutes "custody" for the purposes of the credit statute, Md. Code (1957, 1992 Repl. Vol., 1995 Supp.), Art. 27 § 638C(a), in *Dedo v. State,* 343 Md. 2, 9, 680 A.2d 464, 468 (1996).[13] We said as follows:

> "[T]he restraints placed upon Dedo while in home detention clearly were sufficiently incarcerative to satisfy the custody requirement of Art. 27, § 638C(a) . . . . For any unexcused or unexplained absence from his home during curfew hours, Dedo could have been charged with escape under Art. 27, § 139. Moreover, Dedo was actually committed to the custody of the Warden of WCDC, and, throughout the period of his home detention, Dedo was subject to the control of the Warden and the Home Detention staff; any violation of the home detention would have resulted in his immediate imprisonment. Dedo's movements and activities were electronically monitored through telecommunications video surveillance equipment, and he was required to permit members of the home detention staff into his home at any time of

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[13] In *Deville v. State,* 383 Md. 217, 221, 858 A.2d 484, 486 (2004), we subsequently found that home detention did not meet the requirement of "confinement in a correctional institution," for the purposes of the enhanced penalty statute. *Deville* does not conflict with our decision in *Dedo v. State,* 343 Md. 2, 680 A.2d 464 (1996), as *Dedo* pertains to whether home detention constitutes custody. *See Deville,* 383 Md. at 231, 858 A.2d at 492.

> the day to install and/or inspect the monitoring equipment and to ensure his compliance with the rules of his home detention. In addition, he was not permitted to possess or consume alcoholic beverages and was subject to random urinalysis and breath alcohol testing.
>
> "Further, we believe that where an individual is punishable for escape for any unexcused absence from the place of confinement, his confinement is necessarily involuntary."

Id. at 12-13, 680 A.2d at 469-70. The determination that home detention constitutes custody when calculating time served is in keeping with our reasoning that "[c]ustody is an elastic concept which, for the purposes of escape, connotes restraint upon a person's freedom . . . . When a person is free in every sense of the term, he or she is no longer in custody, and hence, cannot be guilty of the crime of escape." *Farris v. State,* 351 Md. 24, 33, 716 A.2d 237, 242 (1998) (ultimately holding that failure to report for weekend service at a detention center did not constitute an escape from custody because "[p]etitioner did not remain in custody during his absence from the detention center", *id.* at 34, 716 A.2d at 240, where he was free from any restriction during the week). Thus we have upheld convictions for escape where a defendant is in custody, in situations involving a defendant who left work detail at a job site without permission, *see Taylor v. State,* 229 Md. 128, 182 A.2d 52 (1962), or where a prisoner escaped from guard supervision at a hospital while receiving medical treatment, *see Best v. Warden,* 235 Md. 633, 201 A.2d 490 (1964).

Under this reasoning, Shatzer's freedom of movement and action was restricted, because presumably he was not free to simply leave the interrogation room, but had to comply with restrictions on his movement according to the rules and regulations of the correction facility and under the supervision of prison guards. Nothing had changed since Shatzer's first invocation of his right to counsel when he was subject to questioning for a second time on the same matter, and therefore there is no reason to believe that any coercive pressures driving his request for counsel had subsided.[14] The Supreme Court's reasoning in *Roberson* applies, that

> "As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of

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[14] Contrary to the dissent's assertion, the scope of our holding is not "boundless," dissenting op. at 28. We hold merely that there was no break in custody to expire *Edwards* protections, based on the continuous incarceration of Shatzer between two interrogations for the same underlying crime, where he previously invoked his right to counsel. We do not purport to examine all situations where a break in custody might occur, *see supra* at 23. The dissent's hypothetical situations are not the subject of the case *sub judice*, and any accusation that an incarcerated individual who invokes *Edwards* is "question-proof" under today's holding is undercut by a very real and viable alternative — that the police may provide counsel and resume interrogation.

> custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation."

Roberson, 486 U.S. at 683, 108 S. Ct. at 2099. Instead, any further interrogation without counsel should be presumed to "surely exacerbate whatever compulsion to speak the suspect maybe feeling." *Id.* at 686, 108 S. Ct. at 2100. This is particularly true where, in Shatzer's case, both interrogations involved the same underlying crime, for which Shatzer was the only and primary suspect. Without this presumption, we see no incentive to deter police from using release back into general prison population and subsequent re-interrogation of an inmate who had previously requested counsel, rather than honoring the request.

Based on our evaluation of the meaning of custody in light of the purpose of *Edwards,* to protect an individual from coercive pressures and police badgering, we decline, without further guidance, to recognize a "break in custody" exception to the *Edwards* rule regarding an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation when the interrogation relates to the same investigation. Crafting the scope of a break in custody exception to *Edwards,* particularly in the case *sub judice* that involves continuous incarceration, without further direction from the United States Supreme Court, risks blurring the bright-line rule created by *Edwards.*

Our holding need not be so broad as to find incarceration *per se* custody for all purposes. Rather, we limit the scope to addressing the existence of a potential break in custody that would vitiate the protections *of Edwards*. We find highly pertinent the Alaskan appellate court's explanation in *Carr v. State,* 840 P.2d 1000 (Alaska Ct. App. 1992), where the court said as follows:

> "In *Kochutin [v. State,* 813 P.2d 298 (Alaska Ct. App. 1991)] this court considered the rule *of Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 37 8 (1981), which prohibits the police from reinitiating contact with a suspect who has invoked the *Miranda* right to silence during a custodial interrogation, as long as that suspect remains in continuous custody. Kochutin was a sentenced prisoner and was interviewed in jail after having previously invoked his *Miranda* right. The state conceded that Kochutin was in *Miranda* custody when he originally invoked his right to silence. In that context, we decided that, once Kochutin had validly invoked the *Miranda* right, his continued incarceration as a sentenced prisoner qualified as continuous custody for *Edwards* purposes. We did not hold that all sentenced prisoners are *ipso facto* in Miranda custody."

Carr, 840 P.2d at 1005 n.4. We adopt a similar limitation on our holding today, and find that continuous incarceration as a sentenced prisoner qualifies as continuous custody for *Edwards* purposes. In the case of an inmate in continuous incarceration

who invokes his right to counsel, the protections of *Edwards* apply until either counsel is made available to him, or he initiates further conversation with the police. We find this particularly necessary where, as in Shatzer's case, the two interrogations pertained to the same underlying crime.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WASHINGTON COUNTY.

IN THE COURT OF APPEALS OF MARYLAND

No. 124

September Term, 2007

Michael Blaine Shatzer, Sr.

v.

State of Maryland

Bell, C.J.
Harrell
Battaglia
Greene
Murphy
Raker, Irma S. (Retired, specially assigned)
Cathell, Dale, R. (Retired, specially assigned)

JJ.

Dissenting Opinion by Harrell, J., which Cathell, J, joins.

Filed: August 26, 2008

I respectfully dissent. There are at least two independent reasons that strike me as sufficient cause not to apply the bright line rule of *Edwards*[15] to Shatzer's case A break in time of over two years is enough to disengage the blanket rule of *Edwards*. Further, a non-pretextual break in custody here makes inappropriate application of the holding in *Edwards*. Accordingly, Shatzer's 2006 statements should have been admitted.

I. A Substantial Break in Time Disengages the Protections of *Edwards*

A. The Supreme Court's Hint

The Majority Opinion adopts a reluctant tone because of the lack of direct guidance from the U.S. Supreme Court regarding limitations on the breadth of application of the *Edwards* rule, noting correctly that the "issue of whether the passage of time could terminate the protections of *Edwards* remains an open question." Majority Slip op. at21. Casting the federal research net a bit wider, however, reveals an analogous line of cases where the Supreme Court indicated that statements taken after a *Miranda*[16] violation may be admitted after a substantial passage of time and finding the existence of curative measures. I would take the hint and conclude here that a

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[15] *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

[16] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

substantial break in time relieves the need for Shatzer to receive the protections of *Edwards*.

In *Oregon v. Elstad,* 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), two police officers went to the home of a young suspect, Elstad, intent on arresting him in connection with a burglary. While one police officer discussed the arrest with the suspect's mother in another part of the house, the second officer briefly stopped in the living room with Elstad. The latter officer mentioned that he "felt" that Elstad was involved with the burglary. Elstad responded by admitting that he was at the scene of the crime. The police officers took the suspect to the police station, where he waived his *Miranda* rights and signed a confession. The trial judge excluded Elstad's admission, made in his living room, that he was at the scene of the crime, but admitted the confession made after he had received proper *Miranda* warnings. Elstad was convicted of burglary. The Oregon Court of Appeals reversed the conviction, holding that the signed confession also was inadmissible.

The Supreme Court granted certiorari to consider whether "the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." *Elstad,* 470 U.S. at 303, 105 S. Ct. at 1290, 84 L. Ed.2d 222. The Court reversed, reinstating Elstad's conviction. The Court noted that "the absence of any coercion or improper tactics undercuts the twin rationales-trustworthiness and deterrence-for a broader rule" mandating exclusion of the subsequent,

"tainted" confession. *Elstad*, 470 U.S. at 308, 105 S. Ct. at 1293, 84 L. Ed. 2d 222. The Court reasoned:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Elstad, 470 U.S. at 309, 105 S. Ct. at 1293, 84 L. Ed. 2d 222.

The Court noted that "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best." *Elstad,* 470 U.S. at 313-314, 105 S. Ct. at 1295-96, 84 L. Ed. 2d 222. It explained that a failure to give a proper *Miranda* warning could be "cure[d]" by a later *Miranda* warning:

> In these circumstances, a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's

> choice whether to exercise his privilege to remain silent should ordinarily be viewed as an "act of free will."

Elstad, 470 U.S. at 310-311, 105 S. Ct. at 1294, 84 L. Ed. 2d 222 (quoting *Wong Sun v. United States,* 371 U.S. 471, 486, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963)).

The Court concluded:

> A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Elstad, 470 U.S. at 314, 105 S. Ct. at 1296, 84 L. Ed. 2d 222. The need to iterate a bright line rule or test was avoided, however:

> Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda,* was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in

evaluating the voluntariness of his statements.

Elstad, 470 U.S. at 318, 105 S. Ct. at 1297-98, 84 L. Ed. 2.d 222.

In *Missouri v. Seibert,* 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004), the Supreme Court addressed the validity of a "two-step" interrogation. Seibert was arrested in connection with the arson of her mobile home and resulting death of a mentally-ill teenager who resided with her family. She was questioned at the police station for 30 to 40 minutes without being given *Miranda* warnings. She made several incriminating statements during that time, including an admission that she knew that the victim "was meant to die in the fire." The police then allowed her a 20 minute break for coffee and cigarettes. Before the questioning resumed, the police officer read her the *Miranda* warnings. Seibert waived her *Miranda* rights. The police then resumed exploration of her pre-warning admissions. She confirmed that the victim "was supposed to die in his sleep."

After being charged with first degree murder, Seibert moved for the suppression of both the pre-warning and post-warning statements. The police officer testified at the suppression hearing that Seibert's "ultimate statement was 'largely a repeat of information . . . obtained' prior to the warning." *Seibert,* 542 U.S. at 606, 124 S. Ct. 2601, 2606, 159 L. Ed. 2d 643. He further testified that this "two-step" strategy was a police interrogation technique in which he had been trained:

> At the suppression hearing, Officer Hanrahan testified that he made a "conscious decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once."

Seibert, 542 U.S. at 605-606, 124 S. Ct. 2601, 2606, 159 L. Ed. 2d 643.

The trial court excluded the pre-warning statements, but admitted her post-warning statements. Seibert was convicted of murder.

The Supreme Court reversed her conviction. Justice Souter wrote the plurality opinion, in which Justices Stevens, Ginsburg, and Breyer joined. Justice Kennedy wrote a concurrence, as did Justice Breyer. Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

The plurality opinion summarized the questions raised by the "two-step" interrogation procedure:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For

> unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Seibert, 542 U.S. at 611-612, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643. The plurality answered its first rhetorical question regarding the "effectiveness" of the warning given in *Seibert*:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.

Seibert, 542 U.S. at 613, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643. The Court implied, however, that the proximity in time of the two interrogations was a factor in determining whether the *Miranda* warnings retained their effectiveness. "[I]t would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Seibert*, 542 U.S. at 614, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643.

The Court distinguished the "two-step" procedure in *Seibert* from the unwarned admission in *Elstad*. The

Seibert Court began its analysis of *Elstad* by noting the benign nature of the interrogation in *Elstad*:

> This Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest," and described the incident as having "none of the earmarks of coercion," The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother."

Seibert, 542 U.S. at 614, 124 S. Ct. 2601, 2611, 159 L. Ed. 2d 643 (citations omitted). Continuing, the *Seibert* Court stated, "[I]t is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." *Seibert,* 542 U.S. at 615, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

Comparing the two cases, the *Seibert* plurality crafted a list of factors that should be considered in evaluating "two-step" interrogations:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their

> object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad,* it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Seibert, 542 U.S. at 615-16, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

Those factors, applied to the facts in *Seibert* required suppression of the post-warning statements.

> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of

only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

Seibert, 542 U.S. at 616-617, 124 S. Ct. 2601, 2612-13,

159 L. Ed. 2d 643 (citations and footnotes omitted).

Justice Breyer, although joining the plurality opinion, authored a concurrence as well. He stated that, "in my view, the following simple rule should apply to the two-stage interrogation technique: Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Seibert,* 542 U.S. at 617, 124 S. Ct. 2601, 2613, 159 L. Ed. 2d 643 (Breyer, J., concurring).

Justice Kennedy's concurrence is particularly important, as he represents the fifth vote for the judgment in *Seibert.*[17] *See, e.g., United States v. Liddy*, 478 F.2d 586, 586, (D.C. Cir.1972) (Leventhal, J., writing separately) ("I begin with the premise that the *Branzburg* decision is controlled in the last analysis by the concurring opinion of Justice Powell (408 U.S. at 709, 92 S. Ct. at 2670) as the fifth Justice of the

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[17] Where the Supreme Court splits in such a 4-1-4 manner, the concurring opinion is often considered pivotal to discerning a rule to be applied from the case if it provides the narrowest legal grounds upon which a majority of Justices agree. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 n.9, 108 S. Ct. 2138, 2148 n.9, 100 L. Ed. 2d 771 (1988) ("When no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" (quoting *Marks v. United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed.2d 260 (1977)).

majority."). He began by noting that "[e]vidence is admissible when the central concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert*, 542 U.S. at 618-619, 124 S. Ct. 2601, 2614, 159 L. Ed. 2d 643 (Kennedy, J., concurring). Justice Kennedy then compared *Elstad* with the facts in Seibert.

> In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. *See Elstad*, 470 U.S., at 309, 105 S. Ct. 1285 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."). That approach would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be

served by suppression of the . . . testimony." *Id.*, at 308, 105 S. Ct. 1285.

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Seibert, 542 U.S. at 620-621, 124 S. Ct. 2601, 2615, 159 L. Ed. 2d 643 (Kennedy, J., concurring) (omissions in original).

Justice Kennedy, however, disagreed with the plurality's multi-factor test. He noted that he would instead "apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine *the Miranda* warning." *Seibert*, 542 U.S. at 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643 (Kennedy, J., concurring). His test was:

> If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Seibert, 542 U.S. at 622, 124 S. Ct. 2601, 2616, 159 L. Ed. 2d 643 (Kennedy, J., concurring).

Thus, we find *in Seibert* three different tests offered to determine if a statement, after an unwarned admission, is admissible: the plurality's multi-factor test; Justice Breyer's good faith test; and Justice Kennedy's curative measures test. Under all of them, Shatzer's statements made after the 2006 *Miranda* warnings would be admissible.

1. Plurality Test

Applying the factors articulated by the plurality in *Seibert*, it is clear that Shatzer's statements would be admissible. The 2006 interrogations at issue in the present case cannot be viewed as an extension of the 2003 interrogation. The two-year break in time itself

is sufficient. In addition, there was a change in interrogators and location. It may not be said that the interrogations here were "systematic, exhaustive, and managed with psychological skill." 542 U.S. at 616, 124 S. Ct. 2601, 2612, 159 L. Ed. 2d 643.

The *Seibert* plurality analysis inquires: "Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" 542 U.S. at 612, 124 S. Ct. 2601, 2610, 159 L. Ed. 2d 643. The second question, modified to reflect the facts of this case, should be framed as: "Could the 2006 *Miranda* warnings reasonably convey that Shatzer could choose to consult an attorney before talking even if he had exercised that same right over two years earlier?" I would answer both of these questions in the affirmative. There can be no question that Shatzer was aware that he had a meaningful choice regarding his right to consult with counsel.[18]

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[18] The fact that Shatzer previously exercised his right to speak with an attorney provides even further indicia that he was aware he had such a choice. Shatzer witnessed first-hand how the process is designed to work. At the 2003 interrogation, after a few questions, Shatzer indicated he wished to speak with an attorney. The interrogation stopped immediately. No further questions were asked regarding the case for over two years. He witnessed the effect of his assertion of his rights. It cannot be

(continued...)

2. Justice Breyer's Good Faith Test

The actions of the interrogators here meet the definition of good faith. There is no evidence, nor could there be, that the interrogators conspired to avoid the requirements of *Miranda* by delaying an interrogation 31 months. The officers' actions were taken in the utmost good faith.

3. Justice Kennedy's Curative Measures Test

Justice Kennedy would require that, where police officers willfully avoid necessary *Miranda* warnings, subsequent statements must be excluded unless "curative measures are taken." "[A] substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances ...." *Seibert*, 542 U.S. at 622, 124 S. Ct. at 2616, 159 L. Ed. 2d 643. In Shatzer's case, there was over a two-year break in time and a new *Miranda* warning. The goal of the "curative measures" is "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id.*

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[18](...continued)
maintained that, at the 2006 interrogations, Shatzer was unaware that he possessed a legitimate and meaningful right to consult with an attorney. Further proof of Shatzer's knowledge of his right to an attorney is supplied by his request to stop the interrogation on 7 March 2006. There, he invoked his right to consult an attorney despite his obvious emotional distress.

In the present case, the police immediately ceased interrogation upon Shatzer's invocation of his *Miranda* rights. Two years later, they again read him those rights, which he voluntarily waived. A reasonable person in Shatzer's position, and indeed Shatzer himself, would "understand the import and effect of the *Miranda* warning." Thus, under Justice Kennedy's analysis, the narrowest analysis forming the five-vote majority in *Seibert,* Shatzer's post-warning statements would be admissible even if they were obtained as a result of a deliberate "two-step" interrogation.

B. Distinction between *Seibert* and the Present Case

The obvious distinction between *Seibert* and the present case is that *Seibert* involved "unwarned" statements given prior to *Miranda* warnings, warnings deliberately withheld by the police in order to conceal the rights available to the suspect. Shatzer's case does not. Shatzer invoked his *Miranda* rights, and the interrogation immediately was halted. Over two years later, the police gave Shatzer another *Miranda* warning, and he waived his *Miranda* rights. As noted above, under any of the prevailing tests in *Seibert,* especially Justice Kennedy's, Shatzer's later statements would be admissible. Under the Majority Opinion's analysis here, Shatzer's later statements are excluded. This is an unwarranted result.

The *Seibert* tests permit the introduction of statements even where the police mislead deliberately the suspect in order to avoid the protections afforded by *Miranda.* According to the Majority Opinion, by

contrast, where the police act in good faith, timely give *Miranda* warnings, and honor a suspect's assertion of *Miranda* rights, a suspect's statements over two years later, even if proceeded by *a Miranda* warning, are inadmissible. The situation in *Seibert* was a far more egregious violation of the spirit and letter of *Miranda* than the technical, good faith oversight by the latter investigator in the present case. Yet, the statements in *Seibert* receive more favorable treatment. Today, the Majority Opinion essentially says to the police officers who conducted the 2006 interrogations, "We are sorry you acted in good faith and honored both the spirit and letter of *Miranda*. Because you did so, the statements are inadmissible. If only you had withheld deliberately the *Miranda* warning, as in *Seibert,* then perhaps those statements would be admissible following a new *Miranda* warning and similar break in time." What type of police conduct is encouraged by treating statements obtained by deceit and concealment of rights more favorably than those statements obtained by honoring a suspect's *Miranda* rights? I take note of the Supreme Court's acceptance of statements preceded by egregious *Miranda* violations in *Seibert* and would hold that a substantial break in time and a second *Miranda* warning disengages the need for *Edwards'* protections where the police have acted in good faith.

C. Policy Goals of the *Miranda/Edwards*

The Majority Opinion applies the per se *Edwards* rule, refusing to recognize a break in time exception, without apparent consideration of the policy objectives behind the rule and whether they are furthered by

strict application here. The Majority Opinion correctly notes that "[t]he primary"purposes of the *Edwards* rule are to ensure that any statement made in subsequent interrogation is not the result of coercive pressures, to prevent police from badgering a defendant, and to conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness." Majority slip op. at 7. None of those laudable goals are furthered by the outcome reached in the Majority Opinion.

There is no contention here, nor could there be, that Shatzer's statements were the product of coercion. The police officers conducted the 2006 interrogations within permissible legal bounds. There is no evidence that Shatzer did not understand the nature of the interrogation or his legal rights. In *Elstad,* the Court noted that "the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best." *Elstad,* 470 U.S. at 313-314, 105 S. Ct. at 1295-96, 84 L. Ed. 2d 222. I can conceive of no plausible argument that Shatzer suffered a "psychological disadvantage" because the police interrogated him a second time two years after he invoked his right to consult counsel.

The present case has nothing to do with police badgering. Detective Hoover, without actual knowledge that Shatzer previously had requested an attorney, interrogated Shatzer over two years after the original request. Two interrogations in two years is not "badgering." *See* Marcy Strauss, *Reinterrogation,* 22 HASTINGS CONST. L.Q. 359, 396-97 (1995) ("In

other words, the fear *in Edwards* that repeated attempts to question the suspect will exacerbate the already significant compulsion to speak is significantly lessened when the police make no effort to question the suspect for a substantial period of time."). As the Court of Special Appeals noted in *Clark v. State*, 140 Md. App. 540, 598-599, 781 A.2d 913, 947-48 (2001):

> The practical effect of adopting the rule suggested by appellant would produce absurd results. It would create a class of prisoners who are forever question proof-even though law enforcement officers would often have no way of knowing that the prisoner enjoys question-proof status.
>
> *Edwards*, *Roberson*,[19] and *Minnick*[20] were all cases in which reinterrogation took place within three days of the prisoner's invocations of their right to counsel. The evil sought to be avoided was police badgering. But with a gap of more than five years between police interrogation sessions, it is impossible to say that the Montgomery County police "badgered" Clark into waiving his right to counsel. Application of the *Edwards* rule to cases like the one at hand would not help achieve *Edwards's* goal of preventing police badgering, nor would it accomplish any

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[19] *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

[20] *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990).

other discernable public good.

> Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to the rule is not required.

The Majority Opinion notes that one of the benefits of the bright line *Edwards* rule is to "reliev[e] courts from having to make difficult determinations of voluntariness." Majority slip op. at 7. In essence, this is an appeal to *Edwards'* simplicity. Nonetheless "the apparent simplicity of the prophylactic nature of the *[Edwards]* rules may be misleading. In order to avoid absurd results, the rules may have to incorporate some 'case-specific' considerations." George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis,* 1993 U. ILL. L. REV. 207, 231 (1993). *See also* Strauss, *supra,* at 361 ("Yet this seemingly clear, bright-line rule has proven remarkably blurry."). The Majority Opinion only adds to the confusion. Although attempting to preserve the simplicity of *Edwards,* the Majority Opinion holds that "in custody" *for Edwards* purposes is different than "in custody" for *Miranda* purposes. *See, infra,* part III.

Furthermore, the mere fact that no exceptions have been recognized yet for a bright line rule cannot justify not approving such an exception where called for by common sense and persuasive jurisprudence. In other words, the desirability of bright line rules "must be secondary to the content of the rules." Strauss, *supra,*

at 377. The Majority Opinion inappropriately places the goal of "simplicity" above all other substantive policy objectives.

II. Break in Custody Disengages *Edwards* Protections

Although the Majority Opinion declines to address it, I would join the almost universal majority of courts and commentators that recognize that *Edwards'* protections are disengaged by a non-pretextual break in custody. *See, e.g., Kochutin v. State,* 875 P.2d 778, 779 (Alaska App. 1994) ("The continuous custody requirement has been universally recognized by federal courts of appeal and appears to be a well-established feature of the *Edwards* rule."); Elizabeth Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards,* 20 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 539, 569 (1994) ("The courts have unanimously declined to extend the holding in *Minnick* to non-continuous custody cases."); Strauss, supra, at 386 ("Virtually every court that has considered this issue has held (or noted in *dicta)* that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver."). In sum:

> Under existing law, officials can approach an incarcerated suspect who earlier invoked his right to counsel if that inmate's question-proof status ended with a break in custody between the invocation and the later approach for questioning. Thus, a critical question for law enforcement is

> whether a continuously incarcerated suspect can experience a break in custody that will leave him available for questioning, notwithstanding his earlier invocation of the right to counsel.

Laurie Magid, *Questioning the Question-proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. *883, 932 (1997)* (footnotes omitted).

III. Two Years in a Correction Facility Constitutes a "Break in Custody"

In its analysis of whether a prisoner serving a sentence at a correctional facility can experience a "break in custody," the Majority Opinion, in my view, errs.

First, the Majority Opinion appears to overlook the word "break" in "break in custody." It maintains that Shatzer was "not free simply to leave the interrogation room, but had to comply with restrictions on his movement according to the rules and regulations of the correction facility under the supervision of prison guards." Majority slip op. at 34. The point of reference seems to be the prison interrogation room. This arguably establishes that, at the exact time of the 2006 interrogations, Shatzer was in custody. It does not establish that Shatzer was in custody prior to stepping into the interrogation room. When he was in the interrogation room, in custody, the officers gave Shatzer the *Miranda* warning as required. The Majority Opinion equates Shatzer's status in the interrogation room at the prison as the same as being in the prison generally. This is not the case. Even if

Shatzer was "in custody" at the time of the 2006 interrogation, he was not in custody twenty minutes, twenty days, or twenty months before that interrogation. The Majority Opinion simply is incorrect when it states that "[n]othing had changed since Shatzer's first invocation of his right to counsel . . .." Majority slip op. at 34. Something had changed. Shatzer spent many months outside of *Miranda,* and *Edwards,* custody.

The issue in the present case is not whether Shatzer was in custody while he was being interrogated in 2006. He was. Accordingly, he was given *a Miranda* warning. The issue is whether Shatzer was in custody in his daily life at the correction facility *prior to* the 2006 interrogation. It is the lack of custody prior to the 2006 interrogation that creates the relevant "break" in custody.

Second, the Majority Opinion, curiously, relies upon a state case of statutory interpretation, *Dedo v. State,* 343 Md. 2, 680 A.2d 464 (1996), to define the term "custody" as applied to a federal constitutional right. In the name of preserving a simple "bright line" rule, the Majority Opinion adds substantial complexity to the *Miranda* doctrine. "In custody" no longer means "in custody." Under the Majority Opinion's analysis, custody means one thing under *Miranda,* and yet another thing under *Edwards*. The *Edwards* rule is a remedy designed to protect a suspect from *Miranda* violations. But, according to the Majority Opinion here, "any 'break in custody' exception to *Edwards* . . . must mean something different than the test for determining custody for purposes of *Miranda*

warnings." Majority slip op. at 32. The Majority Opinion, ignoring the close, corollary relationship between "custody" in *Miranda* and *Edwards,* instead, with a bit of creativity, compares the "custody" requirement of the sentencing credit statute at issue in *Dedo. See Arizona v. Roberson,* 486 U.S. 675, 680, 108 S. Ct. 2093, 2097, 100 L. Ed. 2d 704 (1988) (noting that the "rule of the *Edwards* case came as a corollary to *Miranda*[] ..."); Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona,* 53 Okla. L. Rev. 11, 22 (2000) (noting that the "rule *of Edwards*" is derived from the "rule of *Miranda*"). I would hold that the definition of custody employed to determine whether a suspect should have been informed *of* his rights *(Miranda)* should be the same as the definition applied in cases where the suspect chooses to invoke those rights *(Edwards).*

The Majority Opinion ignores the definitions *of* "in custody" provided by the progeny of *Edwards'* jurisprudential ancestor, *Miranda.* The Majority Opinion ignores a closely related federal constitutional rule regarding criminal procedure and instead utilizes an unrelated state statutory rule that concerns substantive criminal sentencing.[21] According to the Majority Opinion, "in custody" for *Edwards* purposes is better defined by a state sentencing statute than an inherently related federal constitutional rule. Majority

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[21] For this reason, relying upon state criminal cases defining the crime of "escape" is inappropriate to define concepts associated with federal constitutional rights.

slip op. at 33. In sum, reliance on *Dedo v. State,* 343 Md. 2, 9, 680 A.2d 464, 468 (1996), and similar cases is inappropriate.[22]

I, accordingly, would use federal constitutional law, including *Miranda* progeny, to determine the meaning of "in custody" for purposes of the *Edwards* rule.

A. Cases Addressing *Edwards* Custody

There appear to be only a few cases that address whether a suspect is in *Edwards* custody (as distinguished from *Miranda* custody). The Sixth Circuit held that a defendant in a state penitentiary is not "in custody" for purposes of *Edwards*:

> Defendant Hall was captured and returned to the Eddyville penitentiary in August of 1988. At his arraignment, an attorney was appointed for the defendant. Hall spoke to his attorney concerning those charges. Three months later, a threatening letter was sent from the penitentiary to the President of the United States. Two Secret Service Agents questioned Hall about his involvement. The District Court held a hearing and specifically found that Hall waived his *Miranda* protection. Hall admits he answered a few questions and may have known something

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[22] In fact, the Majority Opinion, except for its definition of custody, relies largely on federal law. The Majority Opinion turned to a state statutory interpretation case for this point of law only.

> about the letter. Hall remained in jail, but he was there because he was already serving a prior sentence. Hall was no stranger to the state penitentiary. In fact, Hall was not "in custody" as that term has been used in the context of *Edwards* and *Roberson*. One could readily argue that Hall was more comfortable within the surroundings in which he was interrogated than the two Secret Service agents.

United States v. Hall, 905 F.2d 959, 962 (1990). I find the analysis of the Sixth Circuit in *Hall* more persuasive than the analysis of the Court of Appeals of Alaska in *Carr v. State*, 840 P.2d 1000 (Ala. App. 1992), the only case cited by the Majority Opinion that distinguishes the definition of custody under *Edwards* from the definition of custody under *Miranda*. Majority slip op. at 36.

Where the Majority Opinion does address federal caselaw regarding a "break in custody" under *Edwards*, its attempts to distinguish the cases are unpersuasive. The Majority Opinion seeks to distinguish *Isaacs v. Head*, 300 F.3d 1232, 1267 (11th Cir. 2002), on the ground that the suspect there was subject to a break in custody because he had been convicted of the crime for which he was interrogated previously. Upon closer analysis, however, it is apparent that the nature of prison life compared to the atmosphere in a police interrogation room was integral to the court's decision. *See Isaacs*, 300 F.3d at 1267 ("This approach recognizes that incarceration in the general prison population is the accustomed milieu for many inmates, rather than the type of coercive

situation that was the source of concern in *Miranda* and its progeny.").

The Majority Opinion's distinction of *United States v. Arrington*, 215 F.3d 855, 856 (8th Cir. 2000), is similarly unpersuasive. The Majority Opinion correctly notes that the conviction and sentencing for the crime for which the suspect was interrogated was an intervening event *in Arrington*. Equally important, however, is the fact that the suspect was transferred from "police custody to correctional custody." *Arrington*, 215 F.3d at 856. "At that point, Arrington was no longer 'in custody' as that term has been used in the context of *Edwards* and *Roberson* . . . ." *Arrington*, 215 F.3d at 856-57 (internal quotation omitted).

The Majority Opinion's attempt to distinguish the Court of Special Appeals's opinion in *Clark v. State*, 140 Md. App. 540, 781 A.2d 913 (2001), falls short. The Majority Opinion contends that the *Clark* panel found "relevant" the fact that the suspect in that case, in the interval between the two interrogations, pled guilty to the crime for which his was interrogated originally. Turning to what the intermediate appellate court deemed persuasive, however, the real holding becomes clear:

> For the foregoing reasons, as well as those set forth in *Arrington*, the portion of the law review article by Magid, quoted *supra*, and Chief Judge Bryner's dissent in *Kochutin*, we hold that: (1) a break in custody is an exception to the rule set forth in *Edwards;* (2) for *Miranda* purposes, *the*

five plus years appellant spent in prison after invoking his right to counsel constituted a break in custody; (3) the trial court did not violate the *Edwards* rule in denying appellant's motion to suppress his September 1998 statement to police.

Clark, 140 Md. App. at 599-600, 781 A.2d at 948 (footnote omitted and emphasis added).

B. Cases Addressing *Miranda* Custody

Applying the *Miranda* analogies, the Majority Opinion acknowledges that today's holding that incarceration constitutes custody *per se* places Maryland in the minority of jurisdictions that have considered the issue under *Miranda*. See Majority slip op. at 29 (noting the "majority view that prison does not constitute *per se* custody for *Miranda* purposes without the finding of some additional restraint"). The majority, and better reasoned, view is that a prisoner in a correctional facility is not "in custody" for purposes of Miranda. See Magid, *supra*, at 935-36 ("After *Mathis*,[23] numerous state and lower courts

expressly held that not all incarceration constitutes *Miranda* custody and that incarceration does not ipso facto render an interrogation custodial." (internal quotation omitted)). "Eight of the twelve Circuit Courts have ruled that incarceration does not always constitute custody for *Miranda* purposes." Magid,

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[23] *Mathis v. United States*, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968).

supra, at 936.

The Fourth Circuit is in agreement:

> We also decline to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and hold that a prison inmate is not automatically always in "custody" within the meaning of *Miranda*. Conley's view of the *Mathis* decision would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial. As the Ninth Circuit pointed out, this approach would "torture *[Miranda]* to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart." *Cervantes,* 589 F.2d at 427. Such a result would be directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result.

United States v. Conley, 779 F.2d 970, 972-73 (1985). The Fourth Circuit noted that the better approach is to determine custody by looking "to the circumstances of the interrogation to determine whether the inmate was subjected to more than the usual restraint on a

prisoner's liberty to depart." *Conley,* 779 F.2d 970, 973.[24]

Conley relied on the Ninth Circuit's opinion in *Cervantes v. Walker,* 589 F.2d 424, 428 (1978):

> The concept of "restriction" is significant in the prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to have "deprived (him) of his freedom of action in any significant way," *Miranda v. Arizona, supra,* 384 U.S. at 444, 86 S. Ct. at 1612 (footnote omitted). In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.

Cervantes, 589 F.2d 424, 428.

The logic behind the differentiation between the

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[24] The Majority Opinion here also relies upon *United States v. Redfield,* 402 F.2d 454, 455(4th Cir. 1968) (per curiam). *Redfield* holds only that the prisoner was in custody when he was at "a prison disciplinary hearing," where, presumably, the prisoner was not free to leave the room. It does not speak to the non-custodial nature of daily prison life. That distinction was clarified by the Fourth Circuit in *Conley,* discussed *infra.*

police station, where a suspect would be in *Miranda* custody, and daily life in a correctional facility, where a prisoner is not in *Miranda* custody, is that a contrast should be drawn between the acquired familiarity of the confines of the correction facility and the intimidating presence of a police interrogation room.

> The principal difference is in the interrogation room. *Miranda's* presumption was designed in part to influence police behavior which was sometimes spontaneous, under a range of circumstances which often included the wish to obtain a quick confession from a recently apprehended suspect. The absolute requirement that *Miranda's* procedures be implemented, coupled with an irrebuttable presumption of compulsion if they were not, was an effective tool in directing police activities. The context of *Edwards* is quite different.

Shapiro, *supra,* at 31.

> Further:
> When a defendant leaves the station house, such as on bail, and resumes the normal routines of life, the Court has recognized that he no longer requires the protection of the *Edwards* prophylactic rule. Such a defendant is entitled to the usual *Miranda* protections, but not the additional prophylactic protection of being rendered question-proof. Likewise, the inmate who has assumed his new routine in prison no longer needs the extra protection of *Edwards*. The restraints necessarily imposed by

> incarceration become familiar matters to inmates and do not create the coercive circumstances in which it must be presumed that one's free will is overborne.

Magid, *supra,* at 947-49.

In his dissent *in Kochutin v. State,* 813 P.2d 298, 309-10 (Alaska App. 1991), Chief Judge Bryner made a similar distinction between the police interrogation room and general prison life:

> When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of public record, the anxiety and uncertainty that support *Miranda's* finding of inherent coercion simply cease to exist. When custody is not related to any pending or unresolved matter, it seems to me that there is little cause for concern that a police officer will appear to control the suspect's fate, at least in the absence of a showing that the officer's conduct somehow creates an atmosphere of custody going beyond that to which the suspect is accustomed in his normal setting.
>
> If it is safe to say under existing case law that a sentenced prisoner cannot automatically be deemed to be in continuing *Miranda* custody, then it is equally safe to say that a sentenced prisoner who invokes the right to counsel upon being

> interrogated under circumstances amounting to *Miranda* custody and is thereafter returned to normal sentenced-prisoner status should not automatically be deemed to be in continuous custody under *Edwards*. Once returned to the ordinary routine of other sentenced prisoners-without any vestige of the inherently coercive circumstances incidental to custodial interrogation-the prisoner should be treated, for *Edwards* purposes, in the same manner as any person who has been arrested, questioned in custody, and released. [Footnote and citations omitted].

IV. Policy Implications of Today's Ruling

The ruling today has troubling policy implications.

> That a rule may be easily stated, though, does not mean that it clearly guides conduct. Application of a long-lasting bar on questioning inmates is enormously difficult in practice. In determining how to proceed during an investigation in which an inmate becomes a suspect, a police officer would have to find out when, if ever, the inmate had invoked his right to counsel with regard to any crime and when, if ever, the inmate had been released from incarceration. This can be a highly formidable task. Many incarcerated suspects will have previously been convicted or at least questioned about numerous other crimes. Many will have been convicted or questioned in far flung parts of the country over the course of many years by law enforcement officials from many different

> jurisdictions. It will often be virtually impossible to determine whether a suspect who has been incarcerated for a number of years has ever invoked his right to counsel and whether he has had any periods of non-confinement after the invocation.

Magid, *supra,* at 927-28.

Under the Majority Opinion's holding, all law enforcement officers from every jurisdiction and agency[25] will be held strictly liable for failure to discover that a suspect previously had invoked the Fifth Amendment right to counsel in connection with any outstanding criminal investigation.[26] Any suspect

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[25] In *Minnick v. Mississippi,* 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990), the Supreme Court reversed the murder conviction of suspect who requested an attorney in an interrogation before FBI investigators and was subsequently questioned by local authorities. Thus, the Majority Opinion's holding today, combined with the facts of *Minnick,* means that a request to speak with an attorney before one law enforcement agency will prohibit another agency from re-opening questioning of that suspect two years later.

[26] In *Arizona v. Roberson,* 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988), the Supreme Court held that once a suspect requests counsel, police are prohibited from initiating a subsequent interrogation regarding a separate criminal investigation. The Majority Opinion's holding, combined with the facts

(continued...)

who invokes such a right is forever unquestionable.

The scope of the holding in the Majority Opinion is boundless. For example, if an incarcerated suspect commits an assault while in prison, are investigators prohibited from interrogating the suspect regarding the newly committed assault after a new *Miranda* warning? Do they need to review the notes from every previous interrogation of that suspect in every jurisdiction and every previously opened criminal investigation to determine if he has, at any point in his life, invoked the right to counsel in a criminal charge that has not been adjudicated? If police have reason to believe that a suspect was present at a crime scene, and thus could provide vital, eye-witness information, is the suspect still off-limits, even after a proper *Miranda* warning? *See* Shapiro, *supra,* at 18 ("One wonders how *Edwards'* own invocation might be evaluated today were it to arise in the context of assessing a reinterrogation by an oblivious officer from another state, years later, about another matter.")

The Majority Opinion will discourage police from investigating new leads to older crimes if a suspect in those crimes already is incarcerated for other crimes. If the police fail to discover that at some interrogation, years ago and by another law enforcement agency, the suspect invoked his right to have counsel present, any statements, no matter how voluntary, will be

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[26](...continued)
and holding of *Roberson,* extends to almost an unfathomable scope.

excludable. The police would be better off to wait for the suspect's release, thus ensuring a break in custody, and then interrogate the suspect. Of course, depending on the length of sentence that the suspect is serving, this delay guarantees that memories will fade, evidence will be lost, and other witnesses will move away or die. The Majority's Opinion will place another obstacle, largely clerical in nature, in front of investigators who have the already unenviable assignment of investigating dormant or "cold cases."

For all of these reasons, I would affirm the judgment of the Circuit Court for Washington County.

Judge Cathell authorizes me to state that he joins this dissent.

PETITIONER'S BRIEF

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In The
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable where there is a break in custody or a substantial lapse in time (here, more than two years and six months) before commencing reinterrogation pursuant to *Miranda*?

PARTIES TO THE PROCEEDING

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ARGUMENT:

THE *EDWARDS V. ARIZONA* PROHIBITION AGAINST INTERROGATION OF A SUSPECT WHO HAS INVOKED THE FIFTH AMENDMENT RIGHT TO COUNSEL IS INAPPLICABLE WHERE THERE IS A BREAK IN CUSTODY OR A SUBSTANTIAL LAPSE IN TIME (HERE, MORE THAN TWO YEARS AND SIX MONTHS) BEFORE COMMENCING REINTERROGATION PURSUANT TO *MIRANDA* 12

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OPINIONS AND ORDERS

The opinion of the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland* (JA 83-166) is reported at 405 Md. 585, 954 A.2d 1118 (2008). The order of the Court of Appeals of Maryland granting certiorari review before judgment in the Court of Special Appeals of Maryland (82a-83a) is reported at *Michael Blaine Shatzer, Sr. v. State of Maryland*, 403 Md. 304, 941 A.2d 1104 (2008). The decision of the Circuit Court for Washington County, Maryland, denying Shatzer's motion to suppress in *State of Maryland v. Michael Blaine Shatzer, Sr.*, Case No. 21-K-06-37799 (JA 55-69) is unreported.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Washington County, Maryland, was filed on August 26, 2008. The petition for writ of certiorari was filed on November 24, 2008, within 90 days of the filing of the opinion as required by Rule 13 of the Rules of the Supreme Court, and was granted on January 26, 2009. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Circumstances of Respondent's Statements

On June 16, 2006, Respondent Michael Blaine Shatzer, Sr., was charged by criminal information filed in the Circuit Court for Washington County, Maryland, Case No. 21-K-06-37799, with a sexual offense in the second degree, sexual child abuse by a parent, second degree assault, and contributing to conditions rendering a child in need of assistance. (*See* JA 1). The charges were filed in connection with Shatzer's conduct in August, 2003, involving his three-year-old son. (*See* JA 76-79).

Prior to trial, Shatzer moved to suppress his March, 2006, inculpatory statements to the police. (*See* JA 1). On August 29, 2006, the state circuit court held a hearing on the suppression motion. (JA 2-54). The court denied Shatzer's motion to suppress in a ruling in open court on September 14, 2006. (JA 55-69). Two witnesses testified at the suppression hearing: Detective Shane Blankenship and Detective Paul Steven Hoover. (JA 8-47). Both officers were assigned to the Criminal Investigation Division of the Hagerstown, Maryland, police department. (JA 8-9, 22).

Detective Blankenship testified that, in August, 2003, while assigned to the Child Advocacy Center of the Criminal Investigation Division, he received a referral from Brenda Lohman, a social worker also assigned to the Center, regarding Shatzer's son's description of an event involving Shatzer. (JA 9, 18, 57). Detective Blankenship interviewed Shatzer's son, who described an incident in which his father "pulled his pants down, exposed his penis, apparently put milk on his penis and told [the child] to lick his worm, or suck his worm, or something to that effect." (JA 9-10).

On August 7, 2003, Detective Blankenship contacted Shatzer at the Maryland Correctional Institution, where Shatzer was being held on a sex-offense charge involving a different victim. (JA 10-11). Detective Blankenship told Shatzer that he was a police officer and read Shatzer his *Miranda* rights.[1] (JA 11-12). Shatzer indicated that he understood the form, but refused to give a statement, telling Detective Blankenship that he did not want to talk about the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

case without an attorney present. (JA 12-14, 19, 21). At that point Detective Blankenship asked Shatzer to contact him when he obtained an attorney, and the interview ended. (JA 12, 19).

Detective Hoover testified at the suppression hearing that on February 28, 2006, social worker Brenda Lohman contacted the police regarding the incident reported by Shatzer's son, and a new investigation was opened and forwarded to the detective. (JA 22-23). Ms. Lohman advised Detective Hoover that there had been a prior investigation, but the facts developed in the initial investigation were not detailed enough to go forward. (JA 23). As a result of the new investigation, the police had since received additional, more specific allegations "because the child was more mature, able to articulate what had happened to him several years before." (JA 23, 38-39, 41, 44, 58).

On March 2, 2006, Detective Hoover, accompanied by Ms. Lohman, interviewed Shatzer at Roxbury Correctional Institution where Shatzer was still serving his sentence on an unrelated sexual offense conviction. (JA 24-25, 77). This interview occurred more than two and one-half years after the questioning by Detective Blankenship on August 7, 2003. (*See* JA 26, 58-59). None of the three, Detective Blankenship, Ms. Lohman, nor Shatzer, advised Detective Hoover that Shatzer had previously asked for an attorney when he was questioned in 2003. (JA 17, 24, 28, 38, 45).

Shatzer expressed surprise to see Detective Hoover, stating that he thought the case was over. (JA 26-27, 38-39, 58-59). Detective Hoover indicated that they had "opened a new file, it's the same allegations." (JA

39). Detective Hoover read the *Miranda* form to Shatzer, who signed the form and agreed to talk with the officer. (JA 26-27, 30-31, 58-59). Detective Hoover testified that at no time did Shatzer say that he wanted an attorney. (JA 27). Detective Hoover stated that there was no concern in his mind when he interviewed Shatzer that Shatzer understood all of his rights, including the right to have an attorney. (JA 29-31, 35-36, 46). At the end of the half-hour interview, Detective Hoover asked Shatzer if he would submit to a polygraph examination, and Shatzer agreed to submit to that test. (JA 31, 59).

On March 7, 2006, Shatzer took a polygraph test. (JA 32-37). Detective Hoover testified at the suppression hearing that the procedure entailed the polygraph operator giving a standardized *Miranda* warning before any questioning or examination procedures commence. (JA 34-37). Shatzer waived his *Miranda* rights. (JA 34).

Shatzer gave a statement admitting to having masturbated in front of his son, but claiming "I didn't force him. I didn't force him." (*See* JA 76-77). Shatzer then became very emotional, requested an attorney, and the interview stopped. (JA 36, 59). Detective Shawn Schultz, the polygraph examiner, scored Shatzer as failing the test. (JA 34).

B. Suppression Court's Ruling

In denying the motion to suppress, the state circuit court rejected Shatzer's claim that his statements were obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). (JA 57-68). The court held:

> [T]here was a break in custody for *Miranda*

> purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edward[s]*; that is to not question the defendant without having an attorney present once he asserts those rights; did not apply. So, I would find that in this case because of the significant length of time, the fact that the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, the fact that Detective Hoover did not know that the defendant had asserted his rights to have an attorney back in August of 2003, all this leads the court to find that the defendant's motion to suppress the statements that he made to Detective Hoover and Detective Schultz in March of 2006 must be denied.

(JA 67-68).

C. Trial and Sentencing Proceedings

Shatzer proceeded to trial on September 21, 2006, on a plea of not guilty submitted on an agreed statement of facts. (JA 70-82). The agreed statement of facts submitted at trial referred to the minor victim's videotaped account that the victim had performed fellatio on Shatzer at Shatzer's direction. (JA 77). The facts showed that Shatzer, who was standing naked in the dining room of the family home, had told his son, "[s]uck my private," and had yelled at the victim. (JA 76-77). The agreed statement of facts also included Shatzer's statements to the police, in

which Shatzer denied that his son had touched him, but admitted having masturbated three feet in front of his son and claimed: "I didn't force him. I didn't force him." (JA 77).

Based on the agreed statement of facts, the trial court found Shatzer guilty of sexual child abuse by a parent. (JA 79). The prosecutor entered a *nolle prosequi* to the second degree sexual offense and the remaining two charges were dismissed as barred on statute of limitations grounds. (*See* JA 72).

Shatzer was sentenced on December 21, 2006, to a term of imprisonment of 15 years, consecutive to any outstanding or unserved Maryland sentence, 10 years of which were suspended with five years of supervised probation upon release. (*See* JA 1). Shatzer noted an appeal on December 28, 2006, to the Maryland intermediate appellate court, the Court of Special Appeals. (*See id.*).

D. Appellate Court Proceedings

On February 13, 2008, the Court of Appeals of Maryland issued a writ of certiorari on its own motion, prior to judgment in the Court of Special Appeals. (JA 89). In an opinion filed on August 26, 2008, the Court of Appeals of Maryland reversed the judgment of the circuit court. (JA 83-166). Citing *Edwards*, the Court of Appeals of Maryland held that "the passage of time *alone* is insufficient to expire the protections afforded by *Edwards*." (JA 111). Stating that, "[w]ithout further guidance from the Supreme Court," it would adhere to the bright-line rule of *Edwards*, the Court of Appeals of Maryland "decline[d] to consider the broad question of whether a break in custody would vitiate

the *Edwards* presumption, because even assuming *arguendo* that a break in custody would do so, under the facts of this case, the only event that may support a break in custody was Shatzer's release back into the general prison population in between the two police interrogations." (JA 112).

The dissent observed that the scope of the holding of the Court of Appeals of Maryland's majority opinion "is boundless":

> For example, if an incarcerated suspect commits an assault while in prison, are investigators prohibited from interrogating the suspect regarding the newly committed assault after a new *Miranda* warning? Do they need to review the notes from every previous interrogation of that suspect in every jurisdiction and every previously opened criminal investigation to determine if he has, at any point in his life, invoked the right to counsel in a criminal charge that has not been adjudicated? If police have reason to believe that a suspect was present at a crime scene, and thus could provide vital, eye-witness information, is the suspect still off-limits, even after a proper *Miranda* warning?

(JA 165). The dissent stated that, for "at least two independent reasons," Shatzer's case provides "sufficient cause not to apply the bright line rule of *Edwards*": "A break in time of over two years is enough to disengage the blanket rule of *Edwards*," and "a non-pretextual break in custody here makes inappropriate application of the holding in *Edwards*." (JA 130).

SUMMARY OF ARGUMENT

Two years and seven months after invoking his right to counsel, Respondent Michael Shatzer waived his *Miranda* rights and gave an inculpatory statement. In the years between interrogations, Shatzer was not in police custody, but rather was returned to state prison where he was serving a sentence on an unrelated offense. There was no claim in the courts below, nor could there be, that the police badgered Shatzer into giving a statement, or that Shatzer's statement was not knowing and voluntary. Nevertheless, the Court of Appeals of Maryland believed it was obligated to suppress Shatzer's confession on the basis of this Court's decisions in *Edwards v. Arizona* and its progeny, applying, in effect, a permanent presumption of coercion.

In *Edwards*, this Court held that once a suspect invokes his right to counsel, a subsequent waiver of rights is presumed to be coerced unless counsel is present or the suspect himself reinitiates communications. *Edwards*, along with *Arizona v. Roberson* and *Minnick v. Mississippi*, thus established a second layer of prophylaxis on top of *Miranda* to guard against police badgering a suspect into waiving his previously asserted *Miranda* right to counsel.

This Court has emphasized that a prophylactic rule should be strictly circumscribed by reference to the rule's purpose. Like *Miranda*, the *Edwards* protection is intended to act as a bulwark against the inherently coercive pressures of interrogation in a police-dominated setting. The *Edwards* presumption should not apply where there is no reasonable possibility of police badgering.

The Maryland court's ruling was an unwarranted extension of the *Edwards* rule. In *Edwards*, *Roberson*, and *Minnick*, the Court applied the *Edwards* presumption to three similarly-situated suspects, each of whom was held for questioning and subjected to a second interrogation within three days of his assertion of the right to counsel. In this case, however, the presumption should terminate for two reasons: the existence of a break in custody and the substantial passage of time.

This Court stated in *McNeil v. Wisconsin*, 501 U.S. 171 (1991) that the *Edwards* rule applies "assuming there has been no break custody." 501 U.S. at 177. Such a change lessens the concern that the police are badgering a witness into withdrawing his invocation of his right to counsel. Whether released to the street or, as in this case, returned to the general prison population, the individual is no longer isolated by the police and is able to resume his daily routine. When again advised of his *Miranda* rights, the suspect is free to decide whether to speak with the police in the absence of counsel.

A second and related factor distinguishing this case from *Edwards*, *Roberson*, and *Minnick* is the two and one-half year lapse of time between interrogations. Because Shatzer had been free from the coercive atmosphere of custodial interrogation for a period of thirty-one months, there can be no plausible argument that he was coerced into talking. Indeed, coercion should not be presumed where reinterrogation is far removed in time from the initial invocation of the right to counsel. A rule that takes no account of the passage of time creates a class of prisoners who, having once invoked their *Miranda* right to counsel, are forever

question-proof. Such a rule would be inconsistent with the objectives of the *Edwards* rule and would produce absurd results.

Moreover, as this Court's *Miranda* jurisprudence makes clear, a per se ban on voluntary confessions is unwarranted when the purpose behind the *Miranda* and *Edwards* protections would not be served. Such a ban is also inconsistent with the treatment accorded the invocation of the right to remain silent. Both the right to silence and the right to counsel under *Miranda* exist to protect the Fifth Amendment right against compelled self-incrimination; the two rights should not receive disparate treatment.

Construing *Edwards* to encompass cases involving a long break in custody or a substantial lapse of time does not protect against coerced confessions and needlessly impairs police investigations. When Shatzer asserted his right to counsel, the police immediately ceased questioning and returned Shatzer to his status as a sentenced prisoner, where he remained for the next two and one-half years. Quite unlike the suspects in *Edwards*, *Roberson*, and *Minnick*, Shatzer did not remain in the inherently coercive circumstances of a pretrial detainee, and applying the presumption of coercion cannot be justified here.

ARGUMENT

THE *EDWARDS V. ARIZONA* PROHIBITION AGAINST INTERROGATION OF A SUSPECT WHO HAS INVOKED THE FIFTH AMENDMENT RIGHT TO COUNSEL IS INAPPLICABLE WHERE THERE IS A BREAK IN CUSTODY OR A SUBSTANTIAL LAPSE IN TIME (HERE, MORE THAN TWO YEARS AND SIX MONTHS) BEFORE COMMENCING REINTERROGATION PURSUANT TO *MIRANDA*.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court "established a number of prophylactic rights designed to counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court announced a second layer of prophylaxis, intended "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Davis v. United States*, 512 U.S. 452, 458 (1994) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). Under *Edwards*, "if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.*

The *Edwards* rule conserves judicial resources and "ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990). "It

remains clear, however, that this prohibition on further questioning — like other aspects of *Miranda* — is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Davis*, 512 U.S. at 458 (quoting *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987)). Because the *Edwards* rule was created by this Court and is not itself a constitutional command, justification for the rule "must be consistent with the practical realities of suspects' rights and police investigations." *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting).

Excluding a statement made under circumstances where there has been a break in custody and a significant passage of time, followed by an effective *Miranda* advisement and the suspect's voluntary election to talk with police without counsel present, would expand *Edwards* beyond its intended purpose. Where, as here, there is no reasonable likelihood of badgering, the *Edwards* presumption of coercion should terminate. When Shatzer invoked his right to counsel, the police immediately honored that right and ceased their questioning. Shatzer was released from police custody and returned to the custody of the Maryland Division of Correction, where he remained for more than two and one-half years. When the police returned, Shatzer was advised of his *Miranda* rights and freely elected to speak with the police.

A. The *Edwards* rule, which superimposed onto *Miranda* a second layer of prophylaxis designed to prevent police badgering after a suspect invokes his right to counsel, should be applied only where this purpose is served.

The Fifth Amendment privilege against compulsory self-incrimination, made applicable to the states by the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Over the past half-century, this Court has devised a set of prophylactic rules to protect the core constitutional right against compelled self-incrimination during custodial interrogation. But, because these bright-line prophylactic rules may mandate the exclusion of "wholly voluntary" statements, *Michigan v. Mosley*, 423 U.S. 96, 99-100 (1975), application of the rules is properly limited by reference to their purpose. *United States v. Patane*, 542 U.S. 630, 639-40 (2004) (plurality opinion); *Davis*, 512 U.S. at 458; *Barrett*, 479 U.S. at 528. "[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102 (discussing invocation of the *Miranda* right to silence).

Before *Miranda*, this Court's "cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process." *Dickerson v.*

United States, 530 U.S. 428, 433 (2000). "Those cases refined the test into an inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Id.* at 434 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

This due process jurisprudence has never been abandoned, but the Court's decisions in *Malloy* and *Miranda* changed the focus of the analysis used to determine the admissibility of statements to police. *Id.* Concerned "that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *id.* at 435, the Court in *Miranda* held that, to have an adequate opportunity to exercise the privilege against compulsory self-incrimination, "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 440 (quoting *Miranda*, 384 U.S. at 467). Therefore, before conducting custodial interrogation, the police must advise a suspect that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 435 (quoting *Miranda*, 384 U.S. at 479). "[F]ailure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (footnote omitted).

"[T]he *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's

case in chief." *Patane*, 542 U.S. at 639. *Miranda*'s prophylactic rule necessarily sweeps beyond the actual protections of the Fifth Amendment. *Id.* The rule provides "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 442. "The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result." *Dickerson*, 530 U.S. at 444; *accord Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (stating that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself"); *Mosley*, 423 U.S. at 100 (observing that *Miranda*'s set of safeguards may exclude a statement even though it "may in fact be wholly voluntary").

Fifteen years after *Miranda*, in *Edwards*, this Court imposed a second layer of prophylaxis applicable when the *Miranda* right to counsel had been invoked. Edwards was arrested pursuant to a warrant for robbery, burglary, and first-degree murder. *Edwards*, 451 U.S. at 478. At the police station, he was advised of his *Miranda* rights and agreed to speak with police. Edwards initially presented an alibi defense, but then announced that he wished to make a deal and that he wanted to speak to a lawyer before he did so. *Id.* at 479. Questioning stopped at that point, and Edwards was transferred to the county jail. *Id.*

The next morning, however, police attempted to continue the interrogation. Two detectives, colleagues of the officer who had questioned Edwards the night before, arrived at the jail and asked to see him. *Id.* "When the detention officer informed Edwards that the

detectives wished to speak with him, he replied that he did not want to talk to anyone." *Id.* Despite Edwards's protestation, "[t]he guard told him that 'he had' to talk and then took him to meet with the detectives." *Id.* The detectives "stated they wanted to talk to him" and again advised Edwards of his *Miranda* rights. *Id.* After listening to an accomplice's taped statement for a few minutes, Edwards agreed to talk to police so long as the interview was not tape recorded. He then confessed to participating in the crime. *Id.*

This Court determined that Edwards's confession should have been suppressed, holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. Further interrogation is permitted only if "the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 485.

Edwards's second-level prophylactic rule was expanded seven years later in *Arizona v. Roberson* to prohibit all police-initiated interrogations after a suspect's request for counsel, even as to unrelated offenses. 486 U.S. at 677-78. The Court stated: "As a matter of law, the presumption raised by a suspect's request for counsel — that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance — does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Id.* at 683.

Further expansion of *Edwards* came in 1990 with

Minnick v. Mississippi, in which the Court held "that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel." 498 U.S. at 150. In the *Edwards* context, "the requirement that counsel be 'made available' to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room." *Id.* at 152. Counsel must be present at the interrogation. *Id.*

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Davis*, 512 U.S. at 458 (quoting *Harvey*, 494 U.S. at 350), and to ensure "that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick*, 498 U.S. at 151; *accord Roberson*, 486 U.S. at 681 (noting that *Edwards*'s purpose is to prevent a waiver of rights that has come at the authorities' "behest" and "insistence"); *accord Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (*Edwards* precludes authorities from badgering or overreaching that might "otherwise wear down the accused and persuade him to incriminate himself"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (*Edwards* establishes a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was"). Where the goals of *Edwards* would not be served, the presumption of coercion should give way.

This Court has never squarely held that the *Edwards* rule should stand as a permanent bar to all police-initiated questioning following invocation of the right to counsel, and to do so where there is no reasonable possibility of badgering would be

unwarranted. Even in the *Edwards* context, subsequent decisions of the Court have made clear that the *Edwards* rule has boundaries consistent with its rationale. In *Davis*, the Court held that *Edwards* applies only where the subject has "unambiguously" invoked his right to counsel. 512 U.S. at 459. Under this standard, the subject "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459; *see also id.* at 462 (holding that "[m]aybe I should talk to a lawyer" was not an unambiguous invocation of the right to counsel). In *Barrett*, the Court held that if the right to counsel is invoked for only a discrete, limited purpose, the *Edwards* prohibition does not apply to police questioning for other purposes, thus ensuring that "the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." 479 U.S. at 528-29 (quoting *Miranda*, 384 U.S. at 469). Finally, the Court has made clear that even after a defendant invokes the right to counsel, the police may resume interrogation where "the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 485. An "initiation" sufficient to authorize renewed police questioning occurs when the defendant "evince[s] a willingness and a desire for a generalized discussion about the investigation," and also knowingly and intelligently waives his right to counsel based on a consideration of the totality of the circumstances. *Bradshaw*, 462 U.S. at 1045-46 (plurality); *United States v. Ware*, 338 F.3d 476, 481 (6th Cir. 2003).

Continuing the *Edwards* presumption of coercion in perpetuity, despite a change in circumstances, produces an individual who, having once asserted his right to counsel, is forever immune from police-initiated questioning about any offense. Such an approach is inconsistent with the pragmatic objectives of this Court's prior opinions. This case presents two clear lines of demarcation consistent with this Court's prior decisions: a break in custody and a significant passage of time. When Shatzer asserted his right to counsel in 2003, Detective Blankenship immediately ceased all questioning, thus honoring Shatzer's assertion of the right. (JA 12-14, 19, 21). In 2006, Detective Hoover again advised Shatzer of his *Miranda* rights. (JA 26-27, 30-31, 58-59). Shatzer was free to assert his rights again, as he had done in 2003, but instead elected to talk with the officer. (JA 31). He was advised yet again of his rights before agreeing to a polygraph examination, and again chose to waive them. (JA 34-37). Under the circumstances here, the 2006 *Miranda* advisements effectively protected Shatzer's right against compelled self-incrimination and ensured that his decision to speak was knowing and voluntary.

B. The *Edwards* presumption of coercion terminated with the break in police custody and Shatzer's return to the general prison population.

A break in custody rule is consistent with the Court's prior decisions in the *Edwards* line of cases. In *Edwards*, *Roberson*, and *Minnick*, each suspect was a pretrial arrestee when he asserted his right to counsel

and when the police reinitiated interrogation. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984). With the termination of the investigative police custody, and the resulting cessation of questioning, the concerns of *Miranda* regarding compelling pressures inherent in a police-dominated environment no longer exist.

This Court recognized as much in *McNeil*, where the Court stated that the *Edwards* rule applies "assuming there has been no break in custody." 501 U.S. at 177. A break in custody is so dramatic a change in circumstance that it is no longer reasonable to presume that a suspect feels incapable of speaking with the police without a lawyer. Such a change lessens the concern that the police are badgering the witness into withdrawing his invocation of his right to counsel. Whether released to the street or, as in this case, returned to the general prison population, the individual is no longer isolated by the police and is able to resume his daily routine.

The termination of the *Edwards* presumption of coercion by a break in custody establishes a bright-line rule for effectuating the second layer of prophylaxis. Expiration of the *Edwards* prohibition constitutes a clearly defined guideline that does not compromise "[a suspect's] privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." *Miranda*, 384 U.S. at 439. Limiting the *Edwards* rule to the period when the suspect is being held for questioning, as was the case in *Edwards*, *Roberson*, and *Minnick*, properly confines the scope of

the rule to those circumstances in which "the 'inherently compelling pressures' of custodial interrogation" are extant. *McNeil*, 501 U.S. at 176.

Against this backdrop, it is not surprising that the majority of lower courts that have addressed the issue have held that *Edwards* does not apply when there has been a break in custody. "The concern of *Edwards* — coercive questioning by the government that deprives a suspect of the benefits of the counsel he has requested — simply is not implicated when a suspect is not in continuous custody." *Kyger v. Carlton*, 146 F.3d 374, 381 (6th Cir. 1998). *See generally* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of* Edwards v. Arizona, 53 Okla. L. Rev. 11, 23 & nn.90-91 (2000) (listing federal circuits and state courts that "have embraced a rule terminating the *Edwards* presumption when there has been a break in custody") (hereinafter Shapiro).

The break in custody rule plainly applies here. Release into the general prison population as a sentenced prisoner, no less than other types of release from police investigative custody, terminates *Miranda* custody and the question-proof status conferred by an earlier invocation of the right to counsel. *See* Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 935 & n.174 (1997) (collecting cases for the proposition that not all incarceration constitutes *Miranda* custody) (hereinafter Magid). Restraints necessarily imposed by incarceration become familiar matters to an inmate and do not create the coercive circumstances in which it must be presumed that one's will is overborne. *Id.* at 929 (opining that "[i]ncarceration in a correctional facility

does not impose on inmates the unrelenting feeling of isolation and powerlessness that deprives the suspect in the station house of the ability to exercise his free will and make his own decision on whether or not to speak with officials about an investigation") (footnote omitted).

Imposition of an additional restraint will return a suspect to a custodial state and entitle him to be given the *Miranda* warnings before any interrogation. Magid, at 893. The warnings constitute "the primary protection afforded suspects subject to custodial interrogation." *Davis*, 512 U.S. at 460.

For these reasons, in *Isaacs v. Head*, the United States Court of Appeals declined to find that *Edwards* was violated by questioning a defendant who was in custody "only in the sense that he is incarcerated as part of the general prison population." 300 F.3d 1232, 1266 (11th Cir. 2002). The court noted that:

> *Edwards* is designed to counteract the "coercive pressures" of being in custody. But for Isaacs, and many other inmates who might have invoked the right to counsel at some past time, incarceration in prison is an accustomed milieu and is far from the potentially coercive situation that gives rise to concerns over police badgering. Therefore, the concerns underlying *Edwards* and its progeny are weaker under the circumstances of this case.

Id. at 1266 (citation omitted). The court concluded that incarceration following a conviction constitutes a break in custody, thereby ending the *Edwards* protections. *Id.* at 1267.

Likewise, in *United States v. Hall*, the government argued that statements given three months after

invocation of the right to counsel were not barred by *Edwards* because, although Hall remained in jail, he was not "in custody" as the term was used in *Edwards*. 905 F.2d 959, 962 (6th Cir. 1990). The United States Court of Appeals noted that one could argue that Hall was more comfortable within the surroundings in which he was interrogated than the two Secret Service agents who interrogated him. *Id.* at 962. The court reasoned that *Edwards* cannot be interpreted to grant "a blanket protection continuing *ad infinitum*." *Id.* at 963; *accord United States v. Arrington*, 215 F.3d 855, 856-57 (8th Cir. 2000) (when Arrington transferred from police custody to correctional custody, *Edwards* presumption was inapplicable).

The same reasoning applies here. Shatzer's lengthy term of incarceration on an unrelated matter minimized any coercive or intimidating process of re-arrest and removal back into custody. Shatzer was not in the position of a pretrial detainee, "worried and uncertain about his fate with regard to . . . pending charges." Magid, 58 Ohio St. L.J. at 948. Application of an irrebuttable presumption of coercion would indeed sweep far more broadly than the *Edwards* rule requires.

C. The *Edwards* presumption of coercion terminated with the substantial passage of time.

A second but related factor distinguishing this case from *Edwards*, *Roberson*, and *Minnick* is the considerable amount of time that passed between Shatzer's invocation of his right to counsel, in 2003, and his confession, in 2006. Insofar as the objective of

Edwards is to prevent police from badgering a suspect into waiving his previously asserted *Miranda* rights, *see, e.g., Minnick*, 498 U.S. at 150, that concern is not implicated when there is a break measured in years, not hours or days. When the police honor a suspect's request for counsel for a significant period of time — well over two years in the present case — *Edwards*'s second layer of prophylactic protection is not warranted. Because Shatzer had been free from the "interrogation atmosphere and the evils it can bring," *Miranda*, 384 U.S. at 456, for a period of thirty-one months, any argument that he was either ignorant of his rights or coerced into talking has "no genuine basis in fact." *Minnick*, 498 U.S. at 163 (Scalia, J., dissenting). As the Maryland court's dissenting opinion properly noted, "[t]wo interrogations in two years is not 'badgering.'" (JA 148-49). *See also* Marcy Strauss, *Reinterrogation*, 22 Hastings Const. L.Q. 359, 396-97 (1995) (noting that "the fear in *Edwards* that repeated attempts to question the suspect will exacerbate the already significant compulsion to speak is significantly lessened when the police make no effort to question the suspect for a substantial period of time").

The Court need not extend the *Edwards* presumption any further than its prior holdings require. It is reasonable to apply a presumption of coercion when the police reinterrogate a suspect, as in *Edwards*, *Roberson*, and *Minnick*, within three days of the assertion of the right. While the language used by the Court in its prior cases may not be susceptible to any durational limitation, these cases should not become unmoored from their facts. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (words of opinions

"are to be read in the light of the facts of the case"). All three cases involved repeated police-initiated questioning within a short time period after the suspect's arrest and original invocation of the right to counsel. In *Edwards*, the police reinitiated interrogation only one day after the suspect invoked his right to counsel. 451 U.S. at 479. In *Roberson*, 486 U.S. at 678, as well as in *Minnick*, 498 U.S. at 148-49, the time interval was three days. Moreover, in *Edwards* and *Minnick*, the subsequent interrogation not only followed quickly on the heels of the assertion of the right, but was also accompanied by official commands to talk to the police. Given the Court's concern about the "coercive pressures that accompany custody," *Minnick*, 498 U.S. at 153, the rationale of excluding confessions in *Edwards*, *Roberson*, and *Minnick* was plain.

In this case, however, where the police did not approach Shatzer for more than two years and six months after Shatzer's request for counsel, and then gave Shatzer a new advisement of *Miranda* warnings, it is appropriate to conclude that the *Edwards* presumption of coercion is inapplicable, and that the warnings themselves were sufficient. To be sure, Detective Hoover's effort to revive a "cold" investigation in no way resembles the "persistent attempts by officials to persuade [a suspect] to waive his rights" that the *Edwards* rule is designed to prevent. *Minnick*, 498 U.S. at 153.

The practical effect of a substantial lapse in time is reflected in Shatzer's reaction to Detective Hoover's appearance at the Roxbury Correctional Institution in 2006. Shatzer initially expressed surprise to see Detective Hoover, stating that he thought the case was

over. (JA 26-27, 38-39, 58-59). Following a fresh set of *Miranda* warnings, Shatzer agreed to talk to Detective Hoover and did not ask for counsel. (JA 26-27, 30-31, 58-59). The notion that Shatzer felt badgered by the police under these circumstances stretches the principles of *Edwards* beyond the breaking point. The Maryland court's mechanical application of the *Edwards* rule in this case ignores obvious practical distinctions and does not serve the purpose of the second layer of prophylaxis. Indeed, there is no sound rationale for extending the *Edwards* presumption in perpetuity.

It is important to underscore the distinction between actual and presumed coercion. Coercion should not be *presumed* when reinterrogation is far removed in time from the initial invocation of the right to counsel. When, as in this case, thirty-one months passed between the first and second interrogation, the Court should look beyond the prophylactic wall, and to the particular facts of the case, to determine whether there is in fact any basis for a finding of police overreaching. There was no overreaching in this case. Detective Hoover reopened the sexual abuse investigation on the basis of more detailed information from the victim. He re-*Mirandized* Shatzer, and, after obtaining a valid waiver, recorded Shatzer's voluntary statement. (JA 32-37). Shatzer's statement should not be excluded on the basis of a presumption of coercion that has no plausible application in this case. Terminating the presumption after a lengthy passage of time would be consistent with *Edwards*, *Roberson*, and *Minnick*, cases in which confessions were obtained within three days of the assertion of the right to counsel and, in *Edwards* and *Minnick*, under

circumstances demonstrating actual coercion.[2]

D. Applying the *Edwards* presumption even where there is a break in custody and a long passage of time would do little to protect against coerced confessions yet would impose serious societal costs.

The two features that distinguish this case from the Court's prior *Edwards* cases — the break in custody and the passage of time — offer independent bases upon which to find the *Edwards* presumption inapplicable. Nevertheless, these two factors also fit seamlessly together, and underscore the need for a more flexible approach to determining when reinterrogation is permissible. Based on the break in custody and the substantial passage of time, Shatzer was in a much different position than the suspects in

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[2] Lower state and federal courts have indicated that the protection of *Edwards* terminates after a significant lapse of time. *See Holman v. Kemna*, 212 F.3d 413, 419 (8th Cir. 2000) (recognizing a lapse in time as a scenario that will militate against a finding of an *Edwards* violation); *Hill v. Brigano*, 199 F.3d 833, 842 (6th Cir. 1999). In *Clark v. State*, 140 Md. App. 540, 599, 781 A.2d 913, 947 (2001), the Court of Special Appeals of Maryland held that a five-year lapse of time between invocation of the right to counsel and reinterrogation terminated the *Edwards* protections when Clark remained in jail during that time. The court rejected the argument that the time lapse made no difference, stating that such a rule "would produce absurd results. It would create a class of prisoners who are forever question-proof." *Id.* The court further stated that applying the *Edwards* rule in that case "would not help achieve *Edwards*'s goal of preventing police badgering, nor would it accomplish any other discernable public good." *Id.* at 599, 781 A.2d at 947-48.

Edwards, *Roberson*, and *Minnick*. Taken singly or in conjunction, these factors demonstrate that Shatzer's confession was in no way coerced. For that reason, application of *Edwards* in these circumstances cannot be justified.

While clarity and certainty are laudable goals to be sure, the brightness of the line should not obscure the objectives that prompted the rule in the first place. *See Bradshaw*, 462 U.S. at 1050 n.3 (Powell, J., concurring in the judgment) (noting that, in the Fourth Amendment context, the Court had "found it necessary to clarify uncertainty that had resulted from decisions of this Court that had undertaken . . . to draw lines that were too refined to be applied consistently"); *see also McNeil*, 501 U.S. at 182 (noting that rules should be "clear and unequivocal, *see e.g.*, *Roberson*, 486 U.S. at 681-682 . . ., but only when they guide sensibly and in a direction we are authorized to go"); *New York v. Quarles*, 467 U.S. 649, 658 (1984) (applying exigent circumstances in *Miranda* context notwithstanding the fact that it "lessen[ed] the desirable clarity of that rule" to some degree).

This Court's *Miranda* jurisprudence underscores the notion that a per se ban on voluntary confessions is not warranted when the purpose behind the *Miranda* and *Edwards* protections would not be served. For instance, the *Elstad* Court observed that

> [i]t is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is

ineffective for some indeterminate period.

470 U.S. at 309. Likewise, in *Mosley*, the Court concluded that police officers "scrupulously honored" the suspect's assertion of the right to silence when they "suspended questioning entirely for a significant period before beginning the interrogation that led to [the suspect's] incriminating statement." 423 U.S. at 107. The Court's approach in *Mosley* blurred the bright-line quality of the *Miranda* rules to some extent. Nevertheless, the Court made clear that *Mosley* rests on the same concern that underlies the *Edwards* rule — the danger that the police will "persist [] in repeated efforts to wear down [the suspect's] resistance and make him change his mind." 423 U.S. at 105-06. The *Mosley* rule has proved to be effective and readily understood both by law enforcement and the courts.

Application of the *Edwards* presumption in circumstances such as this is particularly inappropriate given that the bar on questioning following a suspect's invocation of the right to silence can be lifted, under the totality of the circumstances test, after only a few hours. *Mosley*, 423 U.S. at 104, 107 (permitting resumption of questioning some two hours after invocation of the right to silence where accused was again given full *Miranda* advisements and elected to speak). The dichotomy between the treatment under *Mosley* of an invocation of the right to silence and the consequences flowing under *Edwards* from an invocation of the right to counsel has been justified, at least in part, by "'the unique role the lawyer plays in the adversary system of the criminal justice in this country.'" *Roberson*, 486 U.S. at 682 n.4 (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)). Yet, both the right to silence and the right to counsel

under *Miranda* exist to protect the Fifth Amendment right against compelled self-incrimination. The Court of Appeals of Maryland majority opinion, barring police-initiated questioning even after a break in custody and the passage of more than two years, inappropriately heightens the anomalous treatment accorded an assertion of the Fifth Amendment right to counsel, in contrast to the Fifth Amendment right to silence.[3]

In the *Edwards* context, just as surely as the *Miranda* right-to-silence context, there is no value in imposing "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances." *Mosley*, 423 U.S. at 102; *see also* Shapiro, 53 Okla. L.Rev. at 18 (noting that "the breathtaking scope of the *Edwards* presumption, extending to questioning by other jurisdictions, encompassing the discussion of unrelated matters, and possessing no articulated durational limitation, threatens to pressure courts to discharge the mandate of *Edwards* in a begrudging and potentially undermining manner"). An analysis that recognizes the role of certain limiting factors, such as a break in custody and the passage of time, is more faithful to the objectives the Court intended *Edwards* to protect in the first place. George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule*

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[3] The *Edwards* rule also contrasts with the Sixth Amendment right to counsel in that the *Edwards* rule "is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil*, 501 U.S. at 177 (citation omitted).

Analysis, 1993 U. Ill. L. Rev. 207, 231 (1993) (noting that the *Edwards* bright line rule "may have to incorporate some 'case-specific' considerations" in order "to avoid absurd results").

Indeed, construing the *Edwards* rule as extending to cases such as this, where the second interrogation follows a very long break in custody, would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102; *see also id.* at 102-03 (noting, in the context of right to remain silent, that *Miranda* cannot sensibly be read to "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent").

Because of a break in custody not present in *Edwards*, *Roberson*, and *Minnick*, Shatzer was in far different circumstances than were the suspects in the Court's prior cases. Likewise, the significant passage of time makes this case dramatically different from the cases in which this Court found "persistent attempts by officials to persuade [the accused] to waive his rights." *Minnick*, 498 U.S. at 153. Either ground — the break in custody, or the lapse in time — constitutes an independent ground upon which to find the termination of the *Edwards* presumption. The combination of these factors, *a fortiori*, makes the departure from *Edwards* and its progeny all the more compelling.

Applying the *Edwards* rule in the circumstances of this case is not required to protect the suspect's Fifth Amendment rights. Shatzer's interrogation was

consistent with *Edwards*, but if the Court disagrees and concludes that *Edwards* cannot be read to allow this interrogation, that illogical and untenable result should be rejected and *Edwards* should be overruled. Police and prosecutors would be better served by a more pragmatic rule, as opposed to the Maryland court's construction which unnecessarily impairs the investigation and prosecution of crime.

"Admissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted); *accord McNeil*, 501 U.S. at 181 ("the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good"); *Elstad*, 470 U.S. at 305 ("far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable . . ") (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)). The substantial impairment of law enforcement interests resulting from the Maryland court's inflexible interpretation of *Edwards* outweighs any benefit of the application of a bright line prophylactic rule.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Appeals of Maryland be reversed.

Respectfully submitted,

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April 13, 2009

APPENDIX

United States Constitution, Amendment IV. Security from unwarrantable search and seizure.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V. Rights of accused in criminal proceedings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI - Right to speedy trial, witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV.

Section 1.
[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
[*Appointment of Representatives in Congress*]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of

age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
[*Persons Disqualified from Holding Office*]

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United states, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
[*What Public Debts Are Valid*]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
[*Power to Enforce This Article*]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Code, Title 28, § 1257. State courts; certiorari.

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of

last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e.g.*, 28 U.S.C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

RESPONDENT'S BRIEF

Supreme Court U.S.
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MAY 29 2009
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No. 08-680

In The
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

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QUESTION PRESENTED

Is the *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibition against re-interrogation of a suspect who has invoked the right to have counsel present during custodial interrogation applicable to Respondent, who remained in state custody for two years and seven months and was re-interrogated without counsel about the same allegations?

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STATEMENT OF FACTS

During 2003, Hagerstown City Police Department Detective Shane Blankenship was assigned to the Criminal Investigation Division and, within that unit, to the Child Advocacy Center. JA 8-9. In July of that year, he received a report from a social worker containing allegations that Respondent ordered his son to perform fellatio on him. JA 9-10. According to Detective Blankenship, the child "didn't say he actually did that, he just described the exposure and that was as far as it went by his description." JA 10.

On August 7, 2003, Detective Blankenship met with Respondent, who was incarcerated at the Maryland Correctional Institution in Hagerstown. JA 10. Detective Blankenship administered *Miranda*[1] warnings using a standardized form which Respondent signed. JA 10. Respondent was initially confused; when he realized that Detective Blankenship wanted to question him about a crime, he refused to make a statement and said that he wanted an attorney present. JA 12. Detective Blankenship wrote in his report: "When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present." JA 19. Detective Blankenship asked Respondent "to contact me once he obtained an attorney." JA 19. The investigation was closed in 2003. JA 20.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On February 28, 2006, Detective Paul Hoover was assigned to conduct a follow-up investigation in the case previously assigned to Detective Blankenship. JA 22-23. Detective Hoover learned about the previous investigation from the social worker, who told him about the prior investigation and that she had "opened up a new investigation because these same allegations had popped up again." JA 23. Detective Hoover told Detective Blankenship about his investigation involving Respondent. JA 16. Detective Blankenship informed Detective Hoover that he had been assigned to the case before and was familiar with it. JA 17. Detective Blankenship testified that he "may have" told Detective Hoover that Respondent asked for a lawyer during the 2003 interview, but could not "remember that specifically." JA 17. The two detectives worked together, shared an office, and saw each other every day. JA 46.

Detective Hoover interviewed Respondent on March 2, 2006, at the Roxbury Correctional Institution. JA 24. Respondent had been transferred to this correctional facility and was serving the same sentence that he was in 2003. JA 51, 67. The interrogation took place in "more of a maintenance room than anything else"; it contained a desk and at least three chairs. JA 28-29. Detective Hoover noticed that Respondent seemed surprised: "I recall him saying that he thought that this . . . , these allegations were investigated previously." JA 26 (ellipsis in original). He thought the case was over. JA 39. Detective Hoover informed him that "we were talking to him

again about the same allegations." JA 26. Respondent told Detective Hoover that he had been interviewed by Detective Blankenship. JA 28. Detective Hoover provided *Miranda* warnings, obtained a waiver, and questioned Respondent for about one-half hour. JA 28, 30-31. Respondent discussed the allegations, made a statement, and agreed to submit to a polygraph examination. JA 31.

On March 7, 2006, Detective Hoover returned to the prison along with Detective Shawn Schultz, a polygraph examiner. JA 32. They used the same room for the polygraph examination as was used for the March 2, 2006, interview. JA 35. Detective Schultz provided *Miranda* warnings using a standardized form. JA 33-34. After Detective Schultz administered the polygraph examination, he and Detective Hoover questioned Respondent together. JA 34. During the course of this third interrogation by the two detectives, Respondent began to cry and stated: "I didn't force him. I didn't force him." JA 36, 77. He then asked for an attorney and the interview stopped. JA 36. When the prosecutor asked Detective Hoover at the suppression hearing whether he "would . . . have done [anything] differently" had he been aware of Respondent's prior request for counsel, Detective Hoover answered: "I don't think I would have done anything differently. I think I would have proceeded the way I did. I don't think I had a choice of the matter at the time. I had to do an investigation." JA 46. Following his interrogations of Respondent,

Detective Hoover sought criminal charges, and an indictment was filed on June 16, 2006. JA 1, 37.

At the conclusion of the suppression hearing, defense counsel argued that Respondent had unambiguously invoked his right to counsel when first questioned, and that interrogating him for a second and third time without counsel present violated the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). JA 50-52. The hearing court ruled on September 14, 2006, that Respondent's statements were admissible and denied the motion to suppress evidence. JA 58-59, 67-68. On September 21, 2006, Respondent appeared before the court and entered a not guilty plea to an agreed statement of facts.[2] JA 72. The trial court found Respondent guilty of sexual child abuse based in part on the statements Respondent made to Detective Hoover and Detective Schultz. JA 79.

Respondent noted a direct appeal to the Court of Special Appeals of Maryland on December 28, 2006. JA 1. Before Maryland's intermediate appellate court could rule, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative. *Shatzer v. State*, 941 A.2d 1104 (Md. 2008). JA 89. In a decision issued on August 26, 2008, the Court reversed the suppression hearing court's ruling. JA 128. The Court recognized that the first two interrogations were

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[2] Trial by agreed statement of facts is "essentially a trial by stipulation, at which generally no live witnesses are called." *Atkinson v. State*, 627 A.2d 1019, 1021 n.3 (Md. 1993).

separated only by time; the detectives questioned Respondent about the same allegations, and there was no intervening event such as a guilty plea or sentencing between the interrogations. JA 117. The Court held that the passage of time, by itself, could not void the protection of *Edwards* because "the fact-based analysis such a rule would require would run contrary to the bright-line rule established in *Edwards* and the purpose of *Edwards*." JA 111. The Court declined to recognize a break in custody exception to the rule in *Edwards* "regarding an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation when the interrogation relates to the same investigation." JA 126. The Court reasoned that release into the general prison population between the periods of police interrogation could not constitute a break in custody where the person remained in continuous government custody and where "the second interrogation regards the same underlying crime as the first interrogation involved." JA 112. The Court concluded that, for an inmate continuously serving a sentence who invokes the right to have counsel present during questioning, *Edwards* applies until counsel is provided or the inmate initiates further conversation with law enforcement officers. JA 128.

Two judges filed a dissenting opinion and would have affirmed the hearing court's ruling admitting Respondent's statements. JA 129-66. In their view, *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v.*

Seibert, 542 U.S. 600 (2004), provided analogous situations in which statements taken in violation of *Miranda* may be admitted after "a substantial passage of time and finding the existence of curative measures." JA 130. The dissenters identified three different tests from *Seibert* used to determine if a statement made to police officers after an unwarned statement could be admitted into evidence and determined that, applying each test to the facts of this case, Respondent's statements made during police questioning in 2006 should be admissible into evidence. JA 143, 146. They concluded that "a substantial break in time and a second *Miranda* warning disengages the need for *Edwards'* protections where the police have acted in good faith." JA 147.

On November 24, 2008, the State of Maryland filed a Petition for Writ of Certiorari. This Court granted the writ on January 26, 2009.

SUMMARY OF ARGUMENT

The Court of Appeals of Maryland properly concluded that the rule of *Edwards* was applicable to Respondent's case and required suppression of two statements he made after invoking his right to have counsel present during custodial interrogation because Respondent remained in continuous government custody for a period of two years and seven months and was re-interrogated about the same criminal allegations without counsel present.

A. In *Edwards v. Arizona*, 451 U.S. at 484-85, the Court held that an accused in custody who has invoked the right to have counsel present "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police." *Edwards* represents a bright-line rule which the Court has maintained in the face of requests for exceptions twice before.

B. Permitting an exception for a break in custody does not provide a basis for the Court to formulate an effective alternative rule. A request for help from an attorney during custodial interrogation is no less valid after a person is released. If *Edwards* is restricted in its application only to a period of temporary investigative custody, then its protection would apply to a small number of suspects accused of committing crimes. In addition, permitting an exception to *Edwards* for a break in custody would undermine four recognized goals of its rule: (1) ensuring that confessions made during custodial interrogation are the product of a free choice to speak and not of coercion, (2) providing clear and unequivocal guidance to law enforcement officers and the courts, (3) preventing police officers from badgering suspects into waiving previously asserted *Miranda* rights, and (4) maintaining confidence in the administration of the criminal justice system.

C. Even if the Court were to recognize an exception to the *Edwards* rule where there has been a break in custody, it would not apply in this case. On

August 7, 2003, Respondent invoked his right to have counsel present during custodial interrogation. He was continually incarcerated, without access to counsel, and he did not initiate contact with the police before a detective returned to question him two years later. Furthermore, when questioned on March 2 and March 7, 2006, Respondent did not have counsel with him. Therefore, he was in the same position regarding the investigators in 2006 as he was in 2003; nothing had changed such that his initial election to deal with police interrogation only with assistance from an attorney should not have been honored.

D. There is no logical point on a time line at which the rule of *Edwards* should diminish or expire. Permitting re-interrogation without counsel after 30 days (as proposed by the Criminal Justice Legal Foundation) presents risks of badgering and coercion. Permitting re-interrogation after a longer period of time does not necessarily reduce coercive pressures and would have to take into account changes in circumstances on a case-by-case basis, undermining the usefulness of a bright-line rule.

E. Law enforcement officers are already familiar with the requirements of *Edwards* and have developed policies to ensure compliance with its clear command. *Edwards* itself permits the use of statements made after counsel has been made available or the accused reinitiates contact with the police. Developments in the case law suggest other permissible uses of evidence under circumstances

including: non-custodial interrogation, questioning in response to a public safety emergency, physical fruits of an *Edwards* violation, use of statements resulting from a violation of the rule for impeachment purposes, and the use of statements concerning crimes committed after a suspect invoked the right to counsel. Preserving the rule of *Edwards* will not result in the exclusion of all evidence resulting from re-interrogation.

F. Petitioner's argument that *Edwards* should be overruled is not properly before this Court. It is not supported by the United States as amicus curiae. The *Edwards* rule is clear and easy to apply in all situations. Where Petitioner does not propose an effective alternative, the clear rule of *Edwards* should be preserved.

ARGUMENT

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES SUPPRESSION OF RESPONDENT'S MARCH 2006 STATEMENTS.

A. The Court has established a bright-line rule specifying when police officers can re-interrogate a suspect in custody who has invoked the right to counsel.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness

against himself[.]" In *Miranda v. Arizona*, 384 U.S. 436, 470-73 (1966), the Court ruled that a suspect subject to interrogation while in police custody has the rights to remain silent, to consult with an attorney, to have an attorney present during questioning, and to have an attorney appointed if the suspect is indigent. These rights, stemming from the Fifth and Fourteenth Amendments to the United States Constitution, must be explained prior to the start of questioning. *Id.* at 467-68. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. *Miranda* rights are procedural safeguards put in place to ensure that the Fifth Amendment guarantee is honored. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). A statement resulting from custodial interrogation in violation of *Miranda's* safeguards may not be admitted in the prosecution's case in chief, *Miranda*, 384 U.S. at 479, though it may be admitted for other purposes (as discussed in Section E, below).

The rule of *Edwards* affords protection in addition to *Miranda*. *Davis v. United States*, 512 U.S. 452, 461 (1994). In *Edwards*, the Court held:

> that when an accused has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an

> accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85 (footnote omitted). A purported waiver of the right to counsel one day after invoking the right was ruled invalid when the second interrogation was initiated by law enforcement officers and not by the suspect. *Id.* at 485. The rule is needed to enforce the warnings required by *Miranda* because it is "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*

The Court has recognized that *Edwards* is a bright-line rule. *Davis*, 512 U.S. at 461 ("The *Edwards* rule . . . provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information."); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) ("*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel.") (emphasis in original); *Solem v. Stumes*, 465 U.S. 638, 646 (1984) ("*Edwards* established a bright-line rule to safeguard pre-existing rights[.]"); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986) ("one of the characteristics of *Edwards* is its

clear, 'bright-line' quality"). *See also* 2 Wayne R. LaFave, *Criminal Procedure*, § 6.9(f) (3d ed. 2007) ("*Edwards* is best viewed as a *per se* rule proscribing any interrogation of a person held in custody who has invoked his right to counsel absent the individual's subsequent initiation of conversation.") (footnotes omitted).

The Court has not retreated from the bright-line rule in the cases decided since *Edwards*. In *Arizona v. Roberson*, 486 U.S. 675, 677 (1988), the Court considered whether there is an exception to *Edwards* "for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." The Court concluded that a statement made by Roberson while he was in custody for a different crime and after he invoked the right to counsel must be suppressed. *Id.* at 678. If a suspect invoked the right to counsel during the first interrogation, then law enforcement officers may not initiate a second interrogation unless the suspect has had another opportunity to speak with counsel or is in the presence of counsel. *Id.* at 682. The Court applied a presumption that, if a suspect did not want to speak without an attorney the first time, then he is presumed to want to speak with counsel before making a statement; to presume anything else would violate the prohibition against self-incrimination. *Id.* at 683.

In *Minnick v. Mississippi*, 498 U.S. 146, 147 (1990), the Court was asked "whether *Edwards*' protection ceases once the suspect has consulted with

an attorney." The Court answered in the negative, ruling that "the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel." *Id.* at 150. In *Minnick*, the suspect was arrested on a Friday; on Saturday, when he was questioned by two FBI agents who provided *Miranda* warnings, Minnick told them: "Come back Monday when I have a lawyer." *Id.* at 148-49. He spoke with an attorney two or three times; on Monday, he was questioned without counsel present and made a statement later admitted against him. *Id.* The Court held: "[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* at 153.

In *United States v. Green*, 592 A.2d 985, 986 (D.C. 1991), *cert. granted*, 504 U.S. 908, *cert. dismissed*, 507 U.S. 545 (1993), this Court was presented with the question: "Whether *Edwards v. Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation?". The Respondent died before the Court issued its opinion; the order granting the writ of certiorari was vacated and the petition was dismissed. *Id.*

B. A break in custody should not render the *Edwards* rule inapplicable.

The protection afforded by *Edwards*, once invoked, continues unless an attorney is present during questioning of a suspect in custody or until the suspect initiates contact with the authorities. Nothing in the *Edwards* opinion, or in *Minnick* or *Roberson*, indicates that the protection could be extinguished by a break in custody or would expire over time. The suggestion in *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991), that the *Edwards* protection continues "in the absence of counsel (assuming there has been no break in custody)" was neither essential nor relevant to the holding in that case, which involved the Sixth Amendment right to counsel.

Even defined broadly, a break in custody does not present a principled basis upon which to restrict the scope of *Edwards*. The Court in *Edwards* found that asking for counsel is a significant event beyond deciding to remain silent: "additional safeguards are necessary when the accused asks for counsel." *Edwards*, 451 U.S. at 484. When a suspect being questioned by a police officer asks for an attorney, it is because the person wants help in dealing with the investigative authorities. Whether the person is released from the police station out onto the street, or is released to the general prison population, the fact of the release does not affect the validity of the request for counsel. The Court in *Roberson*, 486 U.S. at 683, recognized that "the presumption raised by a suspect's request for counsel – that he considers

himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." A suspect who has requested counsel must, even if there has been a break in custody, be presumed to want to have counsel to assist him or her in dealing with a second interrogation regarding the same criminal allegations.

To the extent that a break in custody is defined as the end of police custody, recognition of a break in custody exception to the *Edwards* rule would make its protection inapplicable to all but a small number of criminal defendants. This is because a case involving multiple custodial interrogations will almost always involve a break in police custody. A period of investigative detention is generally of a short duration. *See, e.g.*, Fed. R. Crim. Proc. 5(a) (person making an arrest must take the defendant "without unnecessary delay" before a magistrate judge or state or local judicial officer); Md. Rule 4-212(f) (arrestee must be presented before a judicial officer no later than 24 hours after arrest). Therefore, the creation of such an exception would not merely permit but, in fact, would encourage, the police to ignore a suspect's request for counsel in the hope that the suspect will change his or her mind after a brief respite from custody.

A break in custody exception to the rule in *Edwards* does not provide the framework for a clear

and workable rule. Recognizing such an exception would undermine four important goals served by protecting the right to have counsel present for a suspect undergoing custodial interrogation who, like Respondent, asked for help from a lawyer.

1. One primary purpose of *Edwards* is to safeguard the choice of an individual in custody to have an attorney present during questioning. *Davis*, 512 U.S. at 460 ("The rationale underlying *Edwards* is that the police must respect a suspect's wishes regarding his right to have an attorney present during custodial interrogation."). The safeguards set forth in *Miranda* help to ensure that a suspect being interrogated in custody has a free choice between speaking or remaining silent. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). *See also Patterson v. Illinois*, 487 U.S. 285, 291 (1988) ("Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny[.]"). "The reason for the *Edwards* rule is not that confessions are disfavored but that coercion is feared." *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting). Applying *Miranda* and *Edwards* together to prohibit law enforcement officers from re-interrogating a suspect who has asked for help from an attorney but who does not have counsel when the investigators return helps to ensure that confessions made while in police custody are the product of free choice and not of coercion.

2. A second purpose served by the bright-line approach of *Edwards* is providing "'clear and unequivocal' guidelines to the law enforcement profession." *Roberson*, 486 U.S. at 682. In *Minnick*, 490 U.S. at 151, the Court noted: "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." Day to day, "it is police officers who must actually decide whether or not they can question a suspect." *Davis*, 512 U.S. at 461. The bright-line rule of *Edwards* is practical and not unduly limiting to law enforcement efforts. Permitting a break in custody to excuse the protection afforded by *Edwards* would require law enforcement officers to make decisions about whether a suspect has been in custody when the definition of custody in this context is not entirely clear.

A break in custody cannot be defined as a change in physical circumstances because this does not say anything about a person's choice to deal with investigators only with an attorney present. One alternative uses a change in circumstances along with something else. The Court of Appeals of Maryland suggested that "the more appropriate view of custody, for *Edwards* purposes, should be a test on the freedom of movement of the individual and whether the suspect had a meaningful opportunity to secure counsel." JA 122. However, introducing these factors also presents problems of vagueness and undermines the usefulness of a bright-line rule. Police officers would be faced with difficult factual determinations in every case to decide if *Edwards* is

applicable and whether questioning a suspect without an attorney present is permissible.

What the Court said about the value of a bright-line rule in the context of *Miranda* (before *Edwards* was decided) remains true today:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda's* holding has the virtue of informing police and prosecutors with specificity as to what they may do in custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Fare v. Michael C., 442 U.S. 707, 718 (1979). The same need for clear guidance exists in the context of the *Edwards* rule. What is different since *Fare v. Michael C.* was decided is that the burden on law enforcement agencies is less because police officers have become familiar with the rules of *Miranda* and *Edwards*.

The bright-line rule of *Edwards* also benefits the courts in that it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151. Trial judges called upon to ensure compliance with the requirements of *Miranda* and *Edwards* are best served by a bright-line rule. Prior to the decision in *Edwards*, courts engaged in a case-by-case analysis of whether a waiver of the right to counsel by a person who had previously invoked it was knowing, voluntary, and intelligent. *Solem v. Stumes*, 465 U.S. at 647. *See also Dickerson v. United States*, 530 U.S. 428, 432-33 (2000) ("Prior to *Miranda*, we evaluated the admissibility of a suspect's confession under a voluntariness test."). Permitting a break in custody to excuse compliance with *Edwards* requires fact-based determinations of what constitutes custody as well as what would constitute a break in custody. Petitioner's approach would require a return to the case-by-case analysis which undermines the benefit of a rule allowing police officers, prosecutors and trial judges to readily determine the admissibility of statements made during custodial interrogation. Pet. Br. 32.

3. In *Minnick*, 498 U.S. at 150-51, and in *Michigan v. Harvey*, 494 U.S. 344, 350 (1990), the Court observed that a purpose of *Edwards* is "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." Permitting a break in custody to excuse the

protection of *Edwards* would encourage police officers to release a suspect they have questioned, re-arrest the person, provide *Miranda* warnings again, then ask the suspect to waive the rights to remain silent and to have counsel present. Law enforcement officers who repeatedly interrogate suspects who have already invoked the right to counsel, after the passage of 30 days, six months, or any period of time, are engaging in badgering, particularly where, as in Respondent's case, the subject matter of the subsequent interrogation is the same as the interrogation during which the suspects invoked.[3]

4. Permitting investigators to re-interrogate a suspect who has asked for but who has not received assistance from an attorney would undermine confidence in the criminal justice system. Re-interrogation without counsel present excludes the lawyer from pre-trial proceedings. The duty of an attorney is to protect the rights of the client: "In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our

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[3] Petitioner's assertion that "[t]here was no claim in the courts below, nor could there be, that the police badgered Respondent into giving a statement, or that Respondent's statement was not knowing and voluntary" is wrong. Pet. Br. 9. Respondent argued in the Maryland courts that "[t]he second and third interrogations in this case amounted to badgering" and that the two interrogations in 2006 were presumed to be coerced. Appellant's Brief and Appendix at 11-12, *Michael Blaine Shatzer, Sr. v. State of Maryland*, No. 127, September Term 2007 (Dec. 27, 2007).

Constitution." *Miranda*, 384 U.S. at 481. "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Fare v. Michael C.*, 442 U.S. at 719. The rule in *Miranda* "was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Id.* A suspect in custody asks for an attorney because he or she perceives the need for legal advice before speaking with the police. A lawyer can act to protect the rights of a client by determining if or how the client is involved in the crime being investigated by the police and by providing advice. *Id.* at 721. A lawyer's presence during questioning can also help prevent over-reaching by police officers and ensure the accuracy of any statements made. *Miranda*, 384 U.S. at 466, 470. These benefits are lost where, as a result of police-initiated questioning following a break in custody, a suspect who has never had access to counsel succumbs to the pressures of custodial interrogation and waives the right to have counsel present.

The United States as amicus curiae argues that, if a suspect who has previously invoked the right to have counsel present wished to have counsel present during a subsequent interrogation, then he or she can ask for an attorney again, thus reinstating the protection of *Edwards*. U.S. Br. 14-15. A similar

argument advanced by the United States as amicus curiae in support of the Petitioner, the State of Arizona, in *Roberson*, 486 U.S. at 686, was rejected. The Court did not agree with the assertion that repeating *Miranda* warnings after a request for counsel went unfulfilled for three days could overcome the presumption of coercion created by prolonged police custody. *Id.* The same argument made in this case should be rejected for the same reason.

Allowing the right to have counsel present during custodial interrogation to exist, to expire, and to renew itself, as if a Phoenix rising from its own ashes, means that the mechanism for protection has been severed from the constitutional right intended to be safeguarded by means of counsel's presence. The goal of giving the suspect undergoing interrogation some means of control over the proceedings, identified by the Court in *Moran v. Burbine*, 475 U.S. 412, 426 (1986), is undermined when law enforcement officers explain the right to have counsel present, the suspect invokes it, but counsel is never made available. It is unreasonable to expect that a suspect will invoke the right to have counsel a second time when it was never satisfied when first invoked. It is more likely that a suspect would believe that any effort to invoke the right would be futile and that he or she has no choice but to give a statement to the investigator. A suspect in custody who has asked for counsel should not be repeatedly tested to see if he or she still wants an attorney because *Edwards* permits the use of statements made by a suspect who changes his or her

mind and contacts a law enforcement officer. The right to have counsel present during custodial interrogation is not an evil to be avoided. Rather, it is a mechanism put in place to safeguard an important constitutional right.

C. Respondent did not experience a break in custody.

Even if the Court were to recognize that a break in custody could terminate the *Edwards* bar to police-initiated re-interrogation, Respondent did not experience a break such that an exception would apply to him. There is no dispute that Respondent was taken into police custody on August 7, 2003, when Detective Blankenship arrived to meet with him at the Maryland Correctional Institution. JA 10. Respondent refused to give a statement and Detective Blankenship recorded in his report that: "he told me that he would not talk about this case without having an attorney present." JA 19. When the interview ended, Respondent remained in custody within the correctional institution. During the period between the first interrogation on August 7, 2003, and March 2, 2006, when Detective Hoover began the second interrogation, Respondent was never free; he remained incarcerated in connection with an offense unrelated to the investigation. JA 24. Respondent's movement within the prison was controlled by correctional officers. There is no indication in the record that he could have refused to meet with detectives who entered the prison to speak with him.

He was subject to restrictions incident to confinement in a medium security prison. State of Maryland, Dept. of Public Safety and Corr. Services, DCD # 10-12, "Security Levels and Custody Factors," (designating the Maryland Correctional Institution-Hagerstown as Medium Security Level I and the Roxbury Correctional Institution as Medium Security Level II), Appendix 1 (issued May 30, 2002). The Court has held that other fundamental rights may be denied prison inmates. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979) (a person confined in a detention facility has no protection from the Fourth Amendment in his room or cell).

Certain factors identified by the *Miranda* court as contributing to the compulsion to speak while being questioned in police custody – including isolation from familiar surroundings, being confronted with antagonistic forces, and facing techniques of persuasion – are also present in the prison environment. *Miranda*, 384 U.S. at 461. *See also Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (federal agents questioning a suspect in state prison must comply with *Miranda*). Professor Richard A. Leo has identified some of the sources of stress and pressure that can lead to confessions in police custody: "social isolation; confinement in an unfamiliar setting; physical discomfort; perceived lack of control, even helplessness; fear; confusion; uncertainty; the detectives' interpersonal style; the aversive, manipulative, and threatening nature of accusatorial interrogation techniques; and the fear of

being caught, arrested, and prosecuted." Richard A. Leo, *Police Interrogation and American Justice*, 162-63 (Harvard Univ. Press 2008). That many of these factors are present in the prison setting is not surprising, the prison environment being designed to make individuals more, not less, submissive to authority.

At the same time, a criminal case had not been brought against Respondent in 2003; therefore, uncertainty and the threat of potential charges and punishment were present when Respondent was questioned in 2006. The possibility that the interrogator could control Respondent's fate was raised in 2003 and again in 2006 when Detective Hoover appeared to question him. Here, unlike in *Arizona v. Roberson* or *United States v. Green*, Respondent was questioned repeatedly about the same allegations. The decision not to speak without an attorney present must be presumed to apply to future interrogations on the same subject. Nothing had changed such that a court could find that Respondent had changed his mind about dealing with the police only with help from an attorney.

Another factor considered significant by many lower courts is, as the Court of Appeals of Maryland utilized as part of its test for custody, "whether the suspect had a meaningful opportunity to secure counsel." JA 122. It is not clear what steps would constitute a "meaningful opportunity to secure counsel." In *Edwards*, police officers provided the suspect with the telephone number for a county

attorney and permitted him to use the telephone. *Edwards*, 451 U.S. at 479. However, no matter how this phrase is construed, Respondent was not provided with a meaningful opportunity to obtain assistance from a lawyer, a fact of which he was quite obviously aware.

The United States as amicus curiae argues that a prison inmate knows that incarceration will continue whether or not he submits to interrogation. U.S. Br. 18. It is true that, unlike a suspect being held for questioning in a police station, a sentenced inmate cannot anticipate being released immediately if he or she cooperates with the interrogation. However, it is possible that a suspect who is serving a prison sentence could receive a benefit from cooperation with the investigating detectives. For example, a motion for modification or reduction of sentence, if not opposed by the prosecutor, could result in a shorter sentence. Or, cooperating with an investigation could influence investigators to make a recommendation favorably impacting an inmate's chances for parole. Conversely, a prisoner might fear that failing to cooperate will lead to more onerous conditions or even adversely affect his or her release. Despite the sparse record in this case, it is a fair inference that these possibilities dominated Respondent's thoughts as he was being led to the interview room. Continuous imprisonment in state custody, repeated interrogation regarding the same criminal allegations, and the lack of access to counsel make clear that Respondent was not afforded a break in custody.

D. The *Edwards* rule should not be relaxed merely by the passage of time.

At various points in its brief, Petitioner refers to the passage of time it argues is necessary to vitiate the *Edwards* protection as a "substantial passage of time," Pet. Br. 24, 28; a "considerable amount of time," Pet. Br. 24; a "significant period of time," Pet. Br. 25; a "substantial lapse in time," Pet. Br. 26; a "lengthy passage of time," Pet. Br. 27; a "significant lapse of time," Pet. Br. 28; and a "long passage of time," Pet. Br. 28. Presumably, Petitioner intends each phrase to have the same meaning, although it does not bode well for future application of its suggested exception that Petitioner does not employ them in a consistent manner. For example, after stating that the passage of "a significant period of time" requires a lapse of "years, not hours or days," Pet. Br. 25, Petitioner uses the phrase "significant lapse of time" to describe the time between the interrogations in *Holman v. Kemna*, 212 F.3d 413 (8th Cir.), *cert. denied*, 531 U.S. 1021 (2000), and *Hill v. Brigano*, 199 F.3d 833 (6th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000), cases involving the passage of one day and two days, respectively.[4] Adding to the

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[4] The precise issue before the courts in *Holman* and *Hill* was not whether there was a violation of the *Edwards* rule *per se* but, rather, whether the defendants' confessions were tainted by prior interrogations conducted in violation of *Edwards*. Therefore, the "lapse of time" discussed in both cases was the time between the impermissible interrogations and the interrogations resulting in the confessions. *See Holman*, 212 F.3d at 419; *Hill*, 199 F.3d at 842.

confusion, the Court utilized similar terminology – "a significant period of time" – when describing a break of approximately two hours between a suspect's invocation of the right to remain silent and the resumption of questioning by the police in *Michigan v. Mosley*, 423 U.S. 96, 106 (1975). *Cf. United States v. Coleman*, 208 F.3d 786, 790 (9th Cir. 2000) (describing six-day release from custody as "a significant period of time").

Ultimately, although Petitioner does not acknowledge this, it is impossible to specify a non-arbitrary time after which the *Edwards* protection should cease to apply. It is one thing to posit, as Petitioner does, that a suspect who has requested counsel is not likely to feel coerced when the police return to question him or her after the passage of a "substantial," "significant," or "considerable" period of time. It is quite another to fashion a time restriction that both preserves the bright-line nature of the *Edwards* rule and does so in a principled way.

Of the three amici curiae filing briefs in support of Petitioner, only one, the Criminal Justice Legal Foundation ("CJLF"), offers a specific time after which the *Edwards* bar on custodial interrogation should expire. CJLF urges this Court to adopt a 30-day time limit, ostensibly to promote clarity of application with, according to CJLF, "the additional benefit of recency [to the suspect's invocation of the

right to counsel]."[5] CJLF Br. 19. Just why the police should be able to reinitiate questioning after 30 days, as opposed to three weeks, three days, or even three hours, all of which would also possess "the benefit of recency," CJLF does not explain. More importantly, it is hard to see how the fact that the police return to question a suspect soon after he or she has requested counsel will reduce the risk that the suspect will feel pressured into giving a confession. As one scholar who has endorsed a longer (six month) period, acknowledges, "[t]o the extent one errs, making the time interval too short, the fear of badgering and coercing confessions in violation of the Fifth Amendment becomes all too real." Marcy Strauss, *Reinterrogation*, 22 Hastings Const. L.Q. 359, 397 (1995). That fear is heightened, not decreased, for the very reasons CJLF sets forth to defend its proposal: the interrogations are more likely to concern the same offense and be conducted by the same law

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[5] Elsewhere in its brief, CJLF contends that the *Edwards* rule should cease to apply where an invocation of the right to counsel is followed by a "significant lapse in time" or a "significant period of time." CJLF Br. 9, 11. Amici curiae the State of Florida, *et al.*, argue that the *Edwards* rule should not apply after a "substantial lapse of time," but, like Petitioner, make no attempt to specify how much time must pass other than to cite cases in which courts admitted confessions made after periods of time ranging from six hours to "several months." Fla. Br. 2, 17 n.2. Amicus curiae the United States does not contend that the passage of time alone should suffice to vitiate the *Edwards* protection. U.S. Br. 21-23.

enforcement agency, if not the same investigators, the suspect is more likely to feel badgered by his or her interrogators, and the suspect is more likely to still be in police or other government custody.

Yet, while it may be correct to say as a general matter that the possibility of coercion increases as the time between interrogations lessens, the opposite does not hold true. This is because, as the time between interrogations grows, the range of circumstances in which the suspect may find him- or herself also grows. For example, the vast majority of cases in which courts have endorsed a break in custody exception to the *Edwards* rule involve the release (or escape) of the questioned individual from confinement. *See, e.g., United States v. Harris*, 221 F.3d 1048 (8th Cir. 2000); *United States v. Bautista*, 145 F.3d 1140 (10th Cir.), *cert. denied*, 525 U.S. 911 (1998); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994), *cert. denied*, 514 U.S. 1030 (1995); *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989); *Bussard v. State*, 759 S.W.2d 24 (Ark. 1988); *People v. Storm*, 52 P.3d 52 (Cal. 2002), *cert. denied*, 537 U.S. 1127 (2003); *State v. Norris*, 768 P.2d 296 (Kan. 1989); *State v. Scanlon*, 719 N.W.2d 674 (Minn. 2006). In a number of other cases, reinterrogation did not occur until after the individual had time to enter a plea deal with respect to the offense being investigated when he or she invoked the right to counsel. *See, e.g., United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000); *United States v. Garey*,

813 F.Supp. 1069 (D.Vt. 1993); *United States v. Green*, 592 A.2d 985 (D.C. 1991); *Commonwealth v. Wyatt*, 688 A.2d 710 (Pa. Super. Ct. 1997). In contrast, the biggest change in Respondent's life during the period of time between the interrogations was his transfer from Maryland Correctional Institution to Roxbury Correctional Institution, a distance of approximately two-tenths of a mile. JA 10, 24.

Furthermore, as CJLF correctly observes, Respondent did not have a right to appointed counsel during the break between interrogations. CJLF Br. 18 n.2. While the Maryland Office of the Public Defender may, and sometimes does, provide counsel for individuals not facing pending charges, it was under no constitutional or statutory obligation to do so for Respondent. *See* Md. Code Ann., Crim. Proc. Art. § 16-204(b)(1)(i)-(ii) (2008) (stating that indigent defendant is eligible for representation by Office of the Public Defender in "a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense" and "a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge"). Nor were the police under any obligation to assist Respondent in obtaining counsel. *Cf. Duckworth v. Eagan*, 492 U.S. 195, 203-04 (1989) (holding that advisement to defendant that police "have no way of giving [him] a lawyer, but one will be appointed for [him] . . . if and when [he] go[es] to court" was not

improper as matter of state law, under which he was not entitled to counsel prior to filing of formal charges and initial appearance in court, or decision in *Miranda*, which "requires only that the police not question a suspect unless he waives his right to counsel" and "does not require that attorneys be producible on call"). Thus, unlike a defendant who can afford private counsel or an indigent defendant facing pending charges, there was no one to advise Respondent that he needed to re-invoke his right to counsel if and when the police returned to question him after the passage of 30 days, six months, or two years and seven months.

Indeed, the *Miranda* warnings themselves must have appeared differently to Respondent when the police returned to question him for the second time. As noted, it had been over two years since he asked for an attorney, and none had been appointed for him. To the extent that the police were nevertheless permitted to reinitiate questioning after a period of time, re-invocation of the right to counsel at most held out the promise of another temporary reprieve from interrogation. Under these circumstances, the pressure on Respondent to incriminate himself became more, not less, acute due to the passage of time.

E. Declining to recognize exceptions to *Edwards* will not unduly hamper law enforcement efforts.

In the 28 years since *Edwards* was decided, law enforcement officers have become familiar with the procedures required to comply with the Court's ruling. One author advises police officers dealing with suspects invoking the right to counsel: "The key is to listen carefully and document." Ralph B. Means, *Interrogation Law . . . Reloaded: The Two Rights to Counsel*, The Police Chief, Vol. 70, No. 12, December 2003. He continues:

> Once an in-custody suspect has asserted his Fifth Amendment right to counsel, police are prohibited from all further interrogation efforts in all crimes unless the suspect initiates the communication concerning his involvement or counsel has been made available to the suspect. This rule applies even when follow-up interrogators are completely unaware of the earlier assertion of rights. The burden has been placed on the law enforcement community to devise a system for warning investigators of earlier assertions.

Id. (Footnote omitted).

Detailed procedures ensuring compliance are available to police officers. For example, the FBI Legal Handbook for Special Agents contains instructions for (1) documenting a suspect's invocation of the right to counsel, (2) determining if a suspect in the

custody of officers in a different jurisdiction has invoked the right to counsel, (3) creating and maintaining interview logs recording requests for counsel, and (4) retaining records and handwritten interview notes. *FBI Legal Handbook for Special Agents*, §§ 7-4.1-7-13, at 6-18 (2003). Another author recommends that law enforcement agencies develop policies requiring detailed record-keeping when suspects invoke the right to counsel including:

> whether the subject invoked the right to silence or counsel under *Miranda*;
>
> whether the subject was in custody at the time of the invocation;
>
> whether there has been any break in custody;
>
> whether adversarial judicial proceedings have been initiated;
>
> what are the specific charges filed against the subject;
>
> whether the subject requested or accepted the appointment of counsel;
>
> the names and contact numbers of individuals in the prosecutors' offices that can provide information regarding the status of the prosecutions; and the names and contact numbers of the subjects' defense counsel.

Kimberly A. Crawford, *Constitutional Rights to Counsel During Interrogation: Comparing Rights*

Under the Fifth and Sixth Amendments, FBI Law Enforcement Bulletin, Sept. 2002 at 31.

Keeping track of whether a suspect in custody has invoked the right to counsel and maintaining records over the years does not impose an onerous burden on law enforcement agencies as this case demonstrates. Detective Blankenship included in his report made after the August 7, 2003, interview: "When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present." JA 19. The file containing the report was maintained by the Hagerstown Police Department as a matter of course, was available to Detective Hoover, and was produced at the suppression hearing. JA 18, 20, 39. The superiority of a bright-line rule lies in the ease of administration by law enforcement officers and the clear message not to repeatedly question a person who has requested the presence of an attorney. Permitting a break in custody to excuse the protection of *Edwards* would require law enforcement officers to determine whether a suspect in custody who has asked for counsel can be re-interrogated without counsel present under innumerable factual scenarios.

Furthermore, Petitioner's argument that accepting Respondent's position – that neither a break in custody nor the passage of time constitutes an exception to the bright-line rule set forth in *Edwards* – will lead to the creation of a class of "question proof" individuals, or individuals "forever

immune from police-initiated questioning," Pet. Br. 10-11, 20, 22, is inaccurate. The similar concern of amici curiae the State of Florida, *et al.*, that preserving the *Edwards* rule would interfere with efforts to solve "cold cases," Fla. Br. 21, is exaggerated. *Edwards* permits, or at least does not expressly prohibit, the use at trial of evidence gained through custodial interrogation under a variety of different circumstances, including:

1. Initiation by the suspect

By its own terms, the *Edwards* rule does not govern the use of statements obtained when, after invoking the right to counsel, "the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. Thus, a suspect who, after requesting counsel during custodial interrogation, later changes his or her mind and wishes to speak to the police can do so, *see, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), and the police can respond with questions of their own so long as they obtain a valid *Miranda* waiver. Further, the burden on the prosecution to demonstrate re-initiation is far less onerous than the corresponding burden on the accused to prove invocation in the first instance. *Compare Bradshaw*, 462 U.S. at 1045-46 (suspect reinitiates interrogation by asking "ambiguous" question that can "reasonably [be] interpreted by the officer as relating generally to the investigation"), *with Davis*, 512 U.S. at 459 (suspect must "unambiguously" invoke right to counsel).

2. Making counsel available to the suspect

The Court's decision in *Edwards* likewise provides for the second manner in which the prosecution can introduce a statement elicited after a suspect has requested counsel. Even where the individual does not initiate questioning, the police may resume their interrogation after "counsel has been made available to him." *Edwards*, 451 U.S. at 484-85. To be sure, this places some burden on the police. As the Court made clear, it is not enough for the police to give the suspect the phone number of local counsel. *Id.* at 479. Nor may the police reinitiate interrogation without counsel actually being present. *Minnick*, 498 U.S. at 153. Nevertheless, if the concern is that a suspect may change his or her mind sometime after invoking the right to counsel, returning to obtain a waiver only after counsel has been made available is, as the Court of Appeals of Maryland recognized, "a very real and viable alternative" for the police. JA 125. Supplying the accused with counsel is also advantageous to the prosecution, as the suspect will have greater difficulty arguing that any statements made in counsel's presence were not voluntary. *Dickerson*, 530 U.S. at 444.

3. Non-custodial interrogation

As yet, the Court has not confronted a situation in which the police reinitiate questioning at a time when the suspect is no longer in custody. However, the Court's prior decisions suggest that non-custodial interrogation following an invocation of the right to

counsel may not run afoul of the *Edwards* rule. In particular, the Court has consistently resisted efforts to extend *Miranda* to interrogation taking place outside of the context of police custody. *See Pennsylvania v. Bruder*, 488 U.S. 9, 9-11 (1988) (per curiam) (ordinary traffic stop); *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (same); *Minnesota v. Murphy*, 465 U.S. 420, 430-31 (1984) (meeting with probation officer); *California v. Beheler*, 463 U.S. 1121, 1121-22 (1983) (per curiam) (suspect who voluntarily went to police station and was allowed to leave following interview); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (same); *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (grand jury investigation); *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (interview with government agents at suspect's residence); *Garner v. United States*, 424 U.S. 648, 658 (1976) (tax return). Further, language in *Edwards* can be read as restricting its holding to custodial interrogation following a request for counsel. *See Edwards*, 451 U.S. at 485 ("We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused *in custody* if he has clearly asserted his right to counsel.") (emphasis added).[6] *See also United*

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[6] As one commentator has observed, statements made by the suspect would still be subject to suppression under the traditional due process voluntariness test. Strauss, *supra*, at 403 n.154.

States v. Grimes, 911 F.Supp. 1485, 1494 (M.D. Fla. 1996) (observing that "prohibition of further interrogation is limited to subsequent *police-initiated* custodial interrogation and does not preclude mere contact") (emphasis in original); *Wilson v. State*, 444 S.E.2d 306, 311 (Ga.) (Carley, J., concurring) ("Since 'custodial interrogation' is 'absent' in the instant case, there was 'no infringement' of appellant's previously asserted right to counsel and there is 'no occasion' to determine whether appellant made a valid waiver of that previously asserted right."), *cert. denied*, 513 U.S. 988 (1994).

4. Public safety exception

In *New York v. Quarles*, 467 U.S. 649, 655-56 (1984), the Court recognized a "'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence[.]" While the interrogation in *Quarles* did not take place subsequent to an invocation of the right to counsel, and thus the *Edwards* rule was not directly implicated, lower courts have extended the public safety exception to the *Edwards* context. *See, e.g., United States v. Mobley*, 40 F.3d 688, 692-93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995); *United States v. DeSantis*, 870 F.2d 536, 540-41 (9th Cir. 1989); *Trice v. United States*, 662 A.2d 891, 895 (D.C. 1995); *Borrell v. State*, 733 So.2d 1087, 1089-90 (Fla. Dist. Ct. App. 1999). The rationale for recognizing a public safety exception is that "the need for answers to questions in a situation posing a threat to the

public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Quarles*, 467 U.S. at 657. Whether a suspect requested counsel during an earlier interrogation has no bearing on the existence of a threat to the public safety sometime in the future. And, in fact, it is easy to imagine circumstances akin to those before the Court in *Quarles* taking place within the confines of a prison. Thus, by declining to recognize a break in custody or time lapse exception to the *Edwards* rule, the Court would not hamper the ability of law enforcement officials to quickly and effectively respond to emergencies.

5. Physical fruits of an *Edwards* violation

In *Quarles*, *supra*, the defendant sought to suppress two pieces of evidence obtained as a result of his interrogation: his statement concerning the location of a firearm and the firearm itself. Holding that the police did not need to read him his rights because of the existence of a threat to public safety, the Court saw no need to address the question of whether the failure to comply with *Miranda* requires suppression of the physical fruits of an unlawful interrogation. *Quarles*, 467 U.S. at 660 n.9. A decade later, the Court answered that question in the negative. In *United States v. Patane*, 542 U.S. 630 (2004), a majority of the Court held that the failure to provide *Miranda* warnings does not require suppression of physical evidence as the "[a]dmission of nontestimonial physical fruits . . . does not run the

risk of admitting into trial an accused's coerced incriminating statements against himself." *Id.* at 645 (Kennedy, J., concurring). As of yet, the Court has not determined whether the physical fruits of an *Edwards* violation also are not subject to suppression, and lower courts are divided on the question. *Compare United States v. Cherry*, 794 F.2d 201, 207-08 (5th Cir. 1986) (holding that consent to search was not invalid despite being obtained after *Edwards* violation), *cert. denied*, 479 U.S. 1056 (1987), *and In re H.V.*, 252 S.W.3d 319, 327-29 (Tex. 2008) (holding that physical evidence seized as result of *Edwards* violation is not ordinarily subject to suppression but suggesting that "evidence obtained through deliberate violations of constitutional rights" would be inadmissible), *with United States v. Gilkeson*, 431 F.Supp.2d 270, 291-94 (N.D.N.Y. 2006) (holding that physical evidence seized as result of *Edwards* violation is not admissible in government's case-in-chief), *and State v. Harris*, 544 N.W.2d 545, 553-54 (Wis. 1996) (same).

6. Statements admissible for impeachment

A statement taken in violation of *Miranda* (and thus *Edwards*) that is nevertheless voluntary may not be used in the prosecution's case-in-chief but is admissible for impeachment purposes if the defendant testifies in a manner inconsistent with the statement. *See Oregon v. Hass*, 420 U.S. 714, 720-24 (1975); *Harris v. New York*, 401 U.S. 222, 224-26 (1971).

7. Post-invocation offenses

There is at least one additional situation in which questioning by police following a suspect's request for counsel may not lead to suppression of the fruits of the interrogation: interrogation relating to crimes committed after the suspect invoked the right to counsel. The Court's precedents do not resolve the admissibility of evidence under these circumstances, as *Edwards* and *Minnick* involved questioning concerning the same offense and *Roberson* involved questioning concerning an offense committed prior to the defendant's arrest for a different offense and his invocation of the right to counsel. However, in *McNeil*, 501 U.S. at 182 n.3, the Court strongly suggested that individuals may not invoke their *Miranda* rights "anticipatorily." Thus, it may be argued that a request for counsel only bars the government from using testimonial evidence concerning crimes committed prior to the request. *See United States v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990) (declining to adopt rule that "once a defendant has had counsel for any other criminal activity, whether or not he was ever formally charged or convicted, the authorities [a]re precluded from speaking to him about new activity without his counsel's presence"), *cert. denied*, 501 U.S. 1233 (1991). On the other hand, such a limitation may be deemed unacceptable on the ground that, by asking to speak to a lawyer, a suspect thereby indicates his or her desire to deal with the police through counsel with respect to any alleged offense, regardless of when it took place. For present

purposes, it is sufficient simply to note that there is at least one more circumstance in which the *Edwards* rule may not apply to exclude evidence obtained as a result of a post-invocation interrogation.

In short, retaining the bright-line *Edwards* protection for the right to have counsel present during custodial interrogation will not unduly burden law enforcement efforts and will not result in the exclusion of all evidence obtained as a result of re-interrogation.

F. Petitioner's suggestion that *Edwards* be overruled is not properly before the Court.

Petitioner, on the penultimate page of its brief and for the first time in connection with this case, suggests that *Edwards* should be overruled. Pet. Br. 33. This argument was not presented to the Court in the Petition for Writ of Certiorari and is not included in the question presented in this case. The United States as amicus curiae does not seek to overrule *Edwards*. In a brief filed in *Montejo v. Louisiana*, ___ U.S. ___ No. 07-1529 (filed May 26, 2009), the United States took note of the question presented in this case, recognized the validity of *Edwards*, and observed that "*Edwards* would continue to serve as an important supplemental safeguard even if the Court were to impose limits on its duration." Brief for the United States as Amicus Curiae at 7 n.1, *Montejo v. Louisiana*, No. 07-1529 (April 13, 2009), 2009 WL

1019983. As with *Miranda*, the rule in *Edwards* is clear and easy to apply and has become "embedded in routine police practice." *Dickerson*, 530 U.S. at 443. Under the doctrine of *stare decisis*, the Court generally will not depart from a constitutional precedent absent "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Since *Edwards* was decided in 1981, there has not been a change in circumstances in the outside world to justify a departure from this precedent. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (no showing that circumstances have changed so radically as to undermine the crucial factual assumptions underlying the precedent). Amici curiae the State of Florida, *et al.*, stress the need for law enforcement authorities to solve cold cases. Fla. Br. 21. Surely this same need existed in police work in 1981 and long before that.[7] Likewise, the need to protect the constitutional right to be free from self-incrimination has not diminished over the years since *Edwards* was decided. Therefore, there is no cause for overruling *Edwards*.

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[7] If anything, the advent of DNA testing in criminal cases since *Edwards* was decided has reduced the need for law enforcement officers to question suspects in order to solve cold cases.

CONCLUSION

The cherished right to be free from compelled self-incrimination is protected only when a suspect in custody "chooses to speak in the unfettered exercise of his own free will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Fifth Amendment right to be free from compelled self-incrimination "is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges." *Roberson*, 486 U.S. at 685. At stake is the need to ensure that government agents respect the "inviolability of the human personality." *Miranda*, 384 U.S. at 460. The presence of a lawyer requested by a suspect in custody is the mechanism to ensure such respect. Recognizing the evidentiary value of confessions and the need for effective law enforcement efforts to solve crimes and to punish those proven to have violated the criminal law, these needs may still be met while safeguarding individual rights guaranteed by the Constitution. "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States v. White*, 322 U.S. 694, 698-99 (1944). The right to assistance from an attorney during custodial interrogation should not dissipate over time and should not be eroded by

exceptions for a break in custody created on a case-by-case basis.

There is no dispute that, in this case, Respondent did not initiate contact with the police detectives and he had no attorney with him on March 2, 2006, and March 7, 2006. JA 25, 33. Having made a specific request for counsel when he was first interviewed, subsequent questioning initiated by police detectives without counsel present resulted in statements which should have been ruled inadmissible at trial. Therefore, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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May 29, 2009

REPLY BRIEF

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Supreme Court, U.S.
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No. 08-680

In The
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Shatzer would have the prophylactic rule this Court established in *Edwards v. Arizona*, 451 U.S. 477 (1981), and expanded in *Arizona v. Roberson*, 486 U.S. 675 (1988), and *Minnick v. Mississippi*, 498 U.S. 146 (1990)—cases where law enforcement officers sought to question a suspect within three days of his assertion of his Fifth Amendment right to counsel—apply forever, regardless of the passage of time or any change in a suspect's circumstances. Resp. Br. 33. This would be an unjustified expansion of *Edwards*. If, as Shatzer acknowledges, the basis for the *Edwards* rule is that "coercion is feared," Resp. Br. 16 (quoting *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting)), this case would seem a strained application of that rule.

"When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009). The benefits of the rule established by *Edwards* are measured by "the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted." *Montejo*, 129 S. Ct. at 2089 (discussing the Sixth Amendment analog to *Edwards*). Its costs are measured by the extent to which the rule hinders "society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

Shatzer's approach would transform the rule of *Edwards* and its progeny "into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests."

Michigan v. Mosley, 423 U.S. 96, 102 (1975) (discussing the safeguards provided by *Miranda v. Arizona*, 384 U.S. 436 (1966), and the Fifth Amendment right against compelled self-incrimination). Shatzer claims that "*Edwards* is practical and not unduly limiting to law enforcement efforts." Resp. Br. 17. To the contrary, the expansion of the rule that Shatzer advocates is both unworkable and unnecessary.

Shatzer's proposed construction of the rule is unworkable because it would require law enforcement officials to keep track of every suspect who has ever asserted his Fifth Amendment right to counsel, at any time and in any jurisdiction in the entire country —something that common experience demonstrates officials could do only with great difficulty and expense, if at all. Shatzer claims that a perpetual *Edwards* presumption would "not unduly hamper law enforcement efforts," Resp. Br. 33, but fails to account for the myriad of administrative problems such a sweeping policy would necessarily entail. How, for example, would the *Edwards* invocation follow the individual who asserts his right to counsel in a shoplifting case in the District of Columbia, who is later transferred to Maryland authorities on a detainer for an armed robbery, and who is subsequently extradited to California for questioning on a homicide? Further, any conceivable central repository of *Edwards* invocations, an undertaking that Shatzer claims would "not impose an onerous burden," Resp. Br. 35, would have to account for a host of related issues, including dissemination among law enforcement agencies, criminals' reliance on aliases, and the fact that such a database would ensnare individuals who invoked their

right to counsel but were never arrested, much less convicted.

The broad application of the rule urged by Shatzer is also unnecessary. Even after the rule's presumption of coercion is terminated, a statement will be rendered inadmissible where actual coercion or badgering is established. The *Edwards* presumption of coercion should only apply in circumstances where the likelihood of badgering raises a genuine concern that *Miranda* warnings would be inadequate to protect a suspect's Fifth Amendment rights. Application of the presumption where as a general matter there is no possibility that a suspect was badgered into waiving his previously asserted rights requires the exclusion of statements that are entirely voluntary and inhibits legitimate police investigation.

Unless application of the rule is circumscribed, it will be unworkable and unjustified by any reference to its proper purpose. The clarity of a bright line rule, however, need not be sacrificed. One clear termination point is a break in custody. Another would be the passage of a fixed period of time, determined by the Court, after which badgering is unlikely to have occurred. Both provide easily identifiable and practical points at which the *Edwards* presumption would terminate, and both are preferable to the limitless application of *Edwards* that Shatzer advocates.

A. A break in custody, based on return to the general prison population, provides a clear, easily administrable limitation on the *Edwards* prophylactic rule.

In arguing that a break in custody never

terminates the *Edwards* presumption, Shatzer virtually ignores what this Court recently emphasized in *Montejo*, that the purpose of the *Edwards* rule is to prevent police badgering. *Montejo*, 129 S. Ct. at 2085, 2086, 2087, 2089, 2090. Properly viewed as an antibadgering provision, the *Edwards* presumption should terminate when the circumstances are such that it is no longer reasonable to presume that the police are badgering a witness into withdrawing his invocation of the right to counsel. With a break in custody, whether a release to the street or, as in this case, a return to the general prison population, the individual is no longer isolated by the police and is able to resume his daily routine. The break thus serves as a clear, objectively verifiable event sufficient to terminate an irrebuttable presumption of coercion.[1]

A break in custody terminates "an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained"; ends a suspect's custodial communication with the police; and, at that moment, eliminates *Miranda*'s concern with compelled self-incrimination.

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[1]Shatzer and his amicus argue that if the *Edwards* presumption expired upon a break in custody, police might adopt a repetitive "catch-and-release" tactic to circumvent *Edwards*. Resp. Br. 19-20; National Association of Criminal Defense Lawyers ("NACDL") Br. 19. The issue of a pretextual break in custody is not before the Court in this case. Here, the police acted in good faith, and there is no suggestion that Shatzer's release back to the prison population was pretexual. Were the issue to arise, however, the Court could establish a narrow exception, as it did in *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985), for circumstances where the police have adopted policies specifically designed to circumvent the rule.

Miranda, 384 U.S. at 468. If and when a suspect is returned to custody for further investigation, readvisement of the *Miranda* rights—"the primary protection afforded suspects subject to custodial interrogation," *Davis v. United States*, 512 U.S. 452, 460 (1994)—suffices.

Contrary to the claim that a break in custody rule "would be granting police a license to badger suspects," NACDL Br. 19, a break in a suspect's custody terminates the *Edwards* presumption and reflects compliance with the prophylactic protection propounded by the Court in that case. Recognition of the expiration of the *Edwards* protection upon a break in custody provides a bright-line rule and safeguards the Fifth Amendment right against compelled self-incrimination.

Shatzer and his amicus also seek to equate his incarceration on an unrelated conviction as custody for *Edwards* purposes. Resp. Br. at 23-26; NACDL Br. 9-10. Under Shatzer's rationale, any prisoner who has previously invoked his right to counsel may not be questioned by any state agent, however informally and regardless of the purpose of the questioning, absent *Miranda* warnings. This is inconsistent with this Court's precedent. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court stated:

> It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.

Id. at 297.[2] Shatzer's proposed definition of custody under which all inmates are in *Miranda* custody at all times would not only expand *Edwards*, but also *Miranda* itself.

"Continuous government custody," Resp. Br. 6, is not the proper standard for determining whether the *Edwards* presumption applies. *Miranda* itself was based on the "inherently compelling pressures" that exist during protracted "in-custody interrogation." 384 U.S. at 467. In *Roberson*, this Court reiterated that the presumption of coercion is based on "prolonged police custody." *Roberson*, 486 U.S. at 686.

Shatzer's proposed reading of *Edwards* is also at odds with *McNeil v. Wisconsin*, 501 U.S. 171 (1991), in which the Court stated that the *Edwards* rule applies "assuming there has been no break in custody." *Id.* at 177. Despite this Court's express language in *McNeil*, Shatzer posits that a request for an attorney during custodial interrogation "is no less valid after a person is released." Resp. Br. 7. Likewise, his amicus asserts that Petitioner's position, that a break in custody terminates the *Edwards* presumption of coercion, "rests on a misreading" of *McNeil*. NACDL Br. 18. Shatzer's amicus contends that the Court's language in *McNeil* "simply acknowledges that *Edwards* does not apply when a suspect is not in custody." *Id.* To the contrary, the Court's express assumption in *McNeil* of the absence of any "break in custody" is not surplusage,

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[2]As held in *Perkins*, whether a suspect is in *Miranda* custody is determined by the specific circumstances under which the suspect is questioned. 496 U.S. at 297-98; *see also* Wayne R. LaFave, et al., Criminal Procedure § 6.6 ("*Miranda*: When interrogation is 'custodial.'") (3d ed. 2007).

but reflects the context of *Edwards*, as well as *Minnick* and *Roberson*, each of which involved continuous investigative police custody.

Although, as Shatzer acknowledges, "[a] period of investigative detention is generally of a short duration," Resp. Br. 15, it is prolonged police custody and an "interrogator's insinuations that the interrogation will continue until a confession is obtained," *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984), that constitute the coercion inherent in custodial interrogations. It is this coercion that is the target of the *Edwards* prophylactic rule. The no-break-in-custody situation assumed in *McNeil* is the paradigm in which the Court has been operating in *Edwards* and in the cases applying *Edwards*. The cessation of questioning and Shatzer's return to the general prison population ended police custody and should therefore terminate *Edwards*'s irrebuttable presumption of coercion.

B. *Edwards*'s Court-created presumption of coercion should terminate at a point in time when the presumption is incorrect and its prophylactic purpose is no longer being served.

Shatzer argues that "it is impossible to specify a non-arbitrary time after which the *Edwards* protection should cease to apply." Resp. Br. 28. Based on the alleged inability to establish a principled point of termination, Shatzer concludes that the *Edwards* presumption of coercion should never be terminated by the passage of time, but should apply in perpetuity. Resp. Br. 27. This conclusion is flawed in several

respects. *Edwards*, *Roberson*, and *Minnick* can be construed so as to preserve the rule's clarity without resort to an endless presumption of coercion that has no proper basis in fact or law.

Shatzer is wrong as a legal matter in that he assumes the presumption should continue forever unless a termination point can be established with precision. Because *Edwards*'s prophylactic rule is not a constitutional command, but was devised by this Court, it is the Court's "obligation to justify its expansion" to the circumstances presented in this case. *Minnick*, 498 U.S. at 156 (Scalia, J., dissenting) (quoting *Roberson*, 486 U.S. at 688 (Kennedy, J., dissenting)); *accord Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (emphasizing that a prophylactic rule must be justified by reference to its purpose). Per se rules require the Court to make broad generalizations and "should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). It is therefore appropriate to terminate the application of a Court-created presumption at the point where it is reasonable to assume that it is generally incorrect and its purpose is no longer being served.

This Court recently underscored that "[t]he *Edwards* rule is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights[.]'" *Montejo*, 129 S. Ct. at 2085 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). To "badger" is "to harass or urge persistently; pester; nag." *The Random House Dictionary of the*

English Language 154 (2d ed. 1987). In the *Edwards* context, to "badger" is to ask the individual to reconsider his decision with an insistence or frequency that indicates his prior decision to invoke the right to counsel is not being honored. In *Edwards*, the police returned to the defendant the very morning after he had invoked his right to counsel, 451 U.S. at 479; while in *Roberson*, 486 U.S. at 678, and *Minnick*, 498 U.S. at 148-49, law enforcement officers returned within three days of the assertion of the right. In addition, a prison guard informed Edwards that he "had to" talk to the detectives, 451 U.S. at 479, while jailers announced to Minnick that he would "have to talk" to the sheriff and "could not refuse." 498 U.S. at 149. A presumption of coercion, which rendered the renewed *Miranda* waivers in those cases invalid, was well-grounded in fact.

Shatzer maintains that the pressure on an individual to incriminate himself becomes more, not less, acute with the passage of time. Resp. Br. 32. Shatzer's amicus similarly contends that there is nothing in the lapse of time itself from which to deduce that coercion has diminished. NACDL Br. 13. This is simply not so. It is the frequent, repeated attempts to question a suspect who has invoked his right to counsel—the badgering—that indicate to the individual that, notwithstanding the propounding of fresh *Miranda* advisements, his decision is not being honored, thereby rendering any waiver invalid. *Minnick*, 498 U.S. at 162-63 (Scalia, J., dissenting) (merely to ask, "without such insistence or frequency as would constitute coercion," whether suspect would like to reconsider his decision, is not to "badger"). As a general factual proposition, for badgering to be

present, the time between interrogations must be brief.

This is so even where the suspect has been incarcerated. While some inmates may become more compliant with the passage of time, many do not; indeed, many become more hardened and better accustomed over time to dealing with law enforcement authorities. Equally important, as already explained, the restraints that arise with incarceration are not the equivalent of coercion for the purposes of *Miranda* and *Edwards*. That a suspect may become more eager for release as his time in custody increases does not render his waiver involuntary so long as he understands that the choice is his and that it will be honored. "[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick . . . ." *Montejo*, 129 S. Ct. at 2085. Where there are no circumstances creating a likelihood of badgering, the police should not be precluded from returning to ask if the suspect is now willing to talk to the police without counsel.

Shatzer argues that "the *Miranda* warnings themselves must have appeared differently to [him] when the police returned to question him for the second time" because he had invoked his right to counsel, but "none had been appointed for him." Resp. Br. 32. Yet, he correctly concedes that the police were under no obligation to assist him in obtaining counsel. Resp. Br. 31. Thus, in 2003, when Shatzer invoked his Fifth Amendment right to counsel, Detective Blankenship asked Shatzer to contact him when he, Shatzer, obtained an attorney, and then ended the interview. (JA 12, 19). Shatzer would have had no reason to expect that the police would obtain counsel

for him.

This Court has praised *Edwards* for the clear and unequivocal guidelines it provides to the law enforcement profession. *Montejo*, 129 S. Ct. at 2091. Should this Court conclude that the clarity of a bright-line rule must be maintained, the Court properly may draw the line at the point where badgering is unlikely to have occurred, be it the three days that were at issue in *Roberson* and *Minnick*, three weeks, or the thirty days suggested by Amicus Curiae, Criminal Justice Legal Foundation. CJLF Br. 19. *Cf. Ballew v. Georgia*, 435 U.S. 223, 239, 245 (1978) (holding that, while six-person juries pass constitutional muster, five-person juries violate the Sixth and Fourteenth Amendments, but admitting that Court did "not pretend to discern a clear line between six members and five"). Drawing the line at the point after which badgering is unlikely to have occurred is preferable to the limitless and interminable presumption of coercion that Shatzer proposes. The existence of actual badgering would still operate to invalidate a waiver after that point, while the establishment of a clear time limit will serve to protect the core purpose of *Edwards*.

If *Michigan v. Jackson*, 475 U.S. 625 (1986), was the "fourth story of prophylaxis" in the Sixth Amendment context, *Montejo*, 129 S. Ct. at 2092 (overruling *Michigan v. Jackson*), then Shatzer's proposed extension of *Edwards* here would surely amount to a fourth story of Fifth Amendment prophylaxis. And, as this Court concluded in *Montejo*, "the temples have a way of collapsing when one story too many is added." *Id.* at 2092 (citing *Douglas v. City of Jeanette*, 319 U.S. 157, 181 (1943) (opinion

concurring in result)). Accordingly, this Court should reject the rationale of the Court of Appeals of Maryland and hold that the *Edwards* presumption did not apply when Shatzer was reinterrogated some two-and-a-half years after he invoked his right to counsel.

In sum, *Edwards* should not stand as a permanent bar to all police-initiated questioning where there is no reasonable possibility of badgering. A perpetual presumption of coercion is legally and factually unwarranted, and needlessly hampers legitimate law enforcement efforts. The *Edwards* presumption should terminate with a break in custody, the passage of sufficient time to protect against badgering, or both.

CONCLUSION

For the reasons stated herein, and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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June 29, 2009

AMICUS CURIAE BRIEF

No. 08-680

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

MICHAEL BLAINE SHATZER, SR.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), requires the suppression of voluntary statements that respondent made after receiving *Miranda* warnings because, two-and-a-half years earlier, respondent, who was incarcerated on a separate crime and was later released back to the general prison population, had invoked his Fifth Amendment right to counsel when a different law enforcement official sought to question him about the same offense.

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In the Supreme Court of the United States

No. 08-680

STATE OF MARYLAND, PETITIONER

v.

MICHAEL BLAINE SHATZER, SR.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the appropriate application of *Edwards* v. *Arizona*, 451 U.S. 477 (1981)—more particularly, the question whether the protection offered by that decision terminates at some point. The Court's resolution of that question will affect the conduct of federal criminal investigations and trials. The United States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

1. In 2003, a social worker contacted the Hagerstown Police Department about allegations that respondent had ordered his three-year-old son to perform fellatio on him. On August 7, 2003, Detective Shane Blankenship met with respondent at the Maryland Correctional Institute–Hagerstown, where respondent was

serving a sentence for an unrelated crime. Detective Blankenship's written report states that he advised respondent of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and that respondent stated that he did not want to talk about the allegations without an attorney present. Detective Blankenship terminated the interview, and the investigation was closed that same year. Pet. App. 2a-3a, 85a.

In February 2006, the social worker made another referral after respondent's son made more specific allegations. The case was assigned to Detective Paul Hoover because Detective Blankenship was on leave. Detective Hoover knew of the previous investigation, but he did not know respondent had requested an attorney during the August 7, 2003 interview. In the meantime, respondent had remained incarcerated, though he had been transferred to the Roxbury Correctional Institute, where he was confined in the general population. Pet. App. 3a & n.1, 86a, 95a.

On March 2, 2006, Detective Hoover and the social worker met with respondent at the Roxbury Correctional Institute. The interview, which lasted approximately 30 minutes, took place in a maintenance room that contained a desk and three chairs. Detective Hoover was not armed, and respondent was not handcuffed. Respondent expressed surprise at the renewed questioning and stated that he thought the investigation involving his son had been closed. Respondent told Detective Hoover that he had previously met with Detective Blankenship, but did not mention that he had requested an attorney during that meeting. Detective Hoover advised respondent of his *Miranda* rights, and respondent signed a form waiving them, including the right to have an attorney present during questioning. Respondent

denied the fellatio allegation, but admitted masturbating in front of his son. He also agreed to take a polygraph examination. Pet. App. 3a-4a, 86a-87a; 8/29/06 Tr. 22-23.

On March 7, 2006, Detective Shawn Schultz gave respondent another set of *Miranda* warnings and then conducted the polygraph examination. Detective Schultz concluded that respondent's answers indicated deception, and Detectives Hoover and Schultz interviewed respondent immediately afterwards in the same room that had been used on March 2, 2006. During that interview, respondent began to cry and stated: "I didn't force him. I didn't force him." Pet. App. 4a. At that point, respondent requested an attorney, and the detectives terminated the interview. *Ibid.*; 8/29/06 Tr. 25-29.

2. Respondent was charged with a number of offenses, including sexual child abuse. He moved to suppress his statements during the March 2, 2006 and March 7, 2006 interviews, arguing that they had been obtained in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Pet. App. 4a-5a.

The trial court denied respondent's motion to suppress. Pet. App. 84a-98a. The court found that respondent had "freely and voluntarily waived his right to counsel [and] his right to remain silent" on March 2, 2006 and March 7, 2006, and that there had been "a break in custody for *Miranda* purposes" between the August 7, 2003 and the March 2, 2006 interviews. *Id.* at 95a. After a bench trial on stipulated facts, the trial court found respondent guilty of sexual child abuse and sentenced him to 15 years of imprisonment on that charge. *Id.* at 5a-6a.

3. The Court of Appeals of Maryland reversed and remanded for further proceedings. Pet. App. 1a-81a.

a. The majority stated that, "[u]nder *Edwards*, a suspect who expresses a desire to have counsel cannot be subject to further interrogation until counsel has been made available to him or her, unless the accused initiates further communication." Pet. App. 8a. The majority acknowledged that more than two-and-a-half years had elapsed between respondent's invocation of his right to counsel during the interview with Detective Blankenship and his express waivers of that right during the interviews with Detective Hoover, the social worker, and Detective Schultz. *Id.* at 21a. The majority concluded, however, "that the passage of time *alone* is insufficient to expire the protections afforded by *Edwards*." *Id.* at 27a.

The majority also rejected the State's argument that suppression was unwarranted because there was a "break in custody" between the August 7, 2003 and March 2, 2006 interviews. Pet. App. 28a-44a. The majority stated that "[a]ny 'break in custody' exception to *Edwards* * * * must mean something different than the test for determining custody for purposes of *Miranda* warnings," *id.* at 38a, and it held that any break-in-custody exception is categorically inapplicable to "an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation," *id.* at 42a.

b. Two judges dissented. Pet. App. 45a-81a. In their view, there were "at least two independent reasons" for declining "to apply the bright line rule of *Edwards* to [respondent's] case": (1) the "break in time of over two years"; and (2) the presence of "a non-pretextual break in custody." *Id.* at 46a (footnote omitted); see *id.* at 66a-78a.

The dissenters also argued that, under *Missouri* v. *Seibert*, 542 U.S. 600 (2004), respondent's statements during the March 2006 interviews would have been admissible even if Detective Blankenship had deliberately failed to give any *Miranda* warnings at all on August 7, 2003 and had obtained incriminating statements from respondent at that time. Pet. App. 50a-63a. In the dissenters' view, that fact made suppression especially "unwarranted," because here all of the officers had "act[ed] in good faith," respondent was given *Miranda* warnings at the beginning of each of the three interviews, and the officers immediately "honor[ed] [respondent's] assertion of *Miranda* rights" each time he invoked them. *Id.* at 62a. The dissenters also argued that the majority's decision would "discourage police from investigating new leads to older crimes if a suspect in those crimes already is incarcerated for other crimes." *Id.* at 80a.

SUMMARY OF ARGUMENT

The Court of Appeals of Maryland erred in holding that the Fifth Amendment requires suppression of respondent's warned and voluntary statements.

A. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484. The irrebuttable presumption of coercion that the Court announced in *Edwards* is a prophylactic measure designed to support the rules established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The *Edwards* rule thus should not extend more broadly than necessary to fulfill the purposes that motivated its

creation or to cases in which the benefits of the presumption would be outweighed by its substantial costs to the truth-seeking process.

B. This Court has suggested—and the lower courts have broadly held—that the *Edwards* presumption terminates when a suspect experiences a break in the custodial pressures that triggered it. A break-in-custody limitation on *Edwards* is also consistent with the facts and basic premises of this Court's previous cases, which have focused on the risk that continued detention for purposes of interrogation will degrade a suspect's ability to make a knowing and voluntary choice about whether to continue to assert his Fifth Amendment rights.

C. Respondent, although a prison inmate, experienced a break in custody when he returned from interrogation to the general prison population. Service of a prison sentence does not translate into continuous custody for purposes of either *Miranda* or *Edwards* because incarceration pursuant to a criminal conviction does not create the sort of coercive pressures that motivated those decisions. A contrary rule would create significant barriers to effective law enforcement by rendering an entire class of prison inmates—those who have validly invoked their Fifth Amendment right to counsel at any point during what may be a lengthy incarceration—effectively unapproachable for the remainder of their sentences. Because the record does not support a finding that respondent was subject to any restrictions beyond those generally accompanying prison life after he was returned to the prison population following the August 7, 2003 interview, the *Edwards* presumption ceased to apply at that point.

Any doubt that respondent experienced a break in custody for purposes of *Edwards* is eliminated by the

two-and-a-half year lapse between the end of the August 7, 2003 interview and the March 2006 interrogations. Because a prisoner who is serving a previously imposed sentence knows that he will remain incarcerated whether or not he confesses, a prolonged period during which no interrogation occurs will serve to dissipate the sort of coercive pressures on which *Miranda* and the cases following it are premised.

ARGUMENT

THE FIFTH AMENDMENT DOES NOT REQUIRE SUPPRESSION OF RESPONDENT'S MARCH 2006 STATEMENTS

This Court has made clear that the irrebuttable presumption of coercion that it announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), is a prophylactic measure designed to protect and simplify administration of the Fifth Amendment's core prohibition against the admission of a defendant's compelled statements in a criminal prosecution. That presumption should cease to apply where (as here) a break in custody has occurred between a suspect's initial invocation of his Fifth Amendment right to counsel and the commencement of a second interrogation.

A. *Edwards* Establishes A Prophylactic Rule That Should Not Be Applied Where Its Purposes Are Not Served Or Where Its Benefits Do Not Outweigh Its Substantial Costs

1. The Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. As this Court has recognized, the Self-Incrimination Clause "provides only that a person shall not be *compelled* to give evidence against himself." *Michigan* v. *Tucker*, 417

U.S. 433, 448 (1974); see *Oregon* v. *Elstad*, 470 U.S. 298, 306-307 (1985) (same). Accordingly, some "sort of coercion, legal or factual" is a necessary predicate for any claim under that Clause. *Hoffa* v. *United States*, 385 U.S. 293, 304 (1966).

2. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court concluded that custodial interrogation generates "pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. The Court also determined "that reliance on the traditional totality-of-the-circumstances test [to determine voluntariness] raised a risk of overlooking an involuntary custodial confession." *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000).

Miranda thus held that, before conducting a custodial interrogation, the police must inform a suspect that he has the right to remain silent, to consult with counsel, and to have counsel provided if he cannot afford one. The police must also inform the suspect that, if he waives those rights and makes a statement, anything he says may be used against him in court. 384 U.S. at 467-473, 479. Failure to provide these warnings renders any resulting statements inadmissible during the prosecution's case in chief. *Ibid.*

In *Edwards*, the Court announced a "second layer of prophylaxis" for situations where a suspect invokes his Fifth Amendment-based right to have counsel present during custodial interrogation. *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991).[1] The Court held that such a

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[1] The Sixth Amendment right to counsel is not at issue here. That right "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information,

suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-485. *Edwards* further held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.* at 484.

3. The Court has stated that *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990). It therefore constitutes supplementary protection to "ensure[] that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990). The Court also has stated that *Edwards* "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Ibid.*

At the same time, the Court has emphasized the need to "consider the other side of the *Miranda* equation: the need for effective law enforcement." *Davis* v. *United States*, 512 U.S. 452, 461 (1994). "Admissions of guilt

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or arraignment." *McNeil*, 501 U.S. at 175 (internal quotation marks and citation omitted); see *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2581 (2008). The Sixth Amendment right to counsel is also "offense-specific." *Texas* v. *Cobb*, 532 U.S. 162, 168 (2001). When respondent invoked his right to counsel on August 7, 2003, no prosecution had been commenced with respect to the allegations of sexual misconduct involving his son.

are * * * essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986), and "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," *McNeil*, 501 U.S. at 181. As a result, the suppression of statements that may in fact be "wholly voluntary," *Michigan* v. *Mosley*, 423 U.S. 96, 100 (1975), imposes a "high cost to legitimate law enforcement activity," *Elstad*, 470 U.S. at 312. That is particularly so of the *Edwards* rule, which "has only a tangential relation to truthfinding at trial." *Solem* v. *Stumes*, 465 U.S. 638, 643-644 (1984).

The Court has carefully scrutinized whether the benefits of applying *Miranda* and its related doctrines in a particular situation are enough to warrant incurring their substantial costs. For example, the Court has held that a failure to administer the *Miranda* warnings does not render any resulting statement inadmissible for all purposes, see *Harris* v. *New York*, 401 U.S. 222, 226 (1971) (recognizing impeachment exception to *Miranda*), does not require the exclusion of evidence obtained as a result of such statements, see, *e.g.*, *United States* v. *Patane*, 542 U.S. 630 (2004) (holding that a failure to give *Miranda* warnings does not require suppression of physical fruits of voluntary statements); *Tucker*, 417 U.S. at 450-451 (declining to require suppression of the testimony of a third party whom the police first identified through the defendant's unwarned statements), and generally does not prevent the admission of subsequent warned statements, see *Elstad*, 470 U.S. at 308-309.

The Court has adopted the same approach with respect to the "corollary to *Miranda*[]" (*Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988)) that it announced in

Edwards. In *Davis*, the Court declined "to create a third layer of prophylaxis" by "requir[ing] law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney." 512 U.S. at 459, 462. The Court acknowledged that its holding "might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate" their desire not to be questioned without an attorney present. *Id.* at 460. But the Court concluded that a rule requiring the cessation of questioning on an ambiguous invocation "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Ibid.* (quoting *Mosley*, 423 U.S. at 102).

B. The *Edwards* Presumption Should Terminate When There Is A Break In *Miranda* Custody

Edwards is based on a "presum[ption]" "that if a suspect believes that he is not capable of undergoing [custodial] questioning without advice of counsel, then * * * any subsequent waiver that has come at the authorities' behest * * * is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Roberson*, 486 U.S. at 681 (quoting *Miranda*, 384 U.S. at 467). This Court has suggested, and the lower courts have uniformly and correctly held, that the *Edwards* presumption should cease when a suspect experiences a break in the custodial pressures that gave rise to it in the first place. That conclusion is consistent with the facts and underlying premises of this Court's decisions in *Miranda*, *Edwards*, and subsequent cases.

1. In *McNeil*, this Court held that an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding does not constitute an invocation of the Fifth Amendment right to counsel that is the subject of the *Edwards* rule. See 501 U.S. at 173, 177-182; see note 1, *supra*. In "describ[ing] the nature and effects of * * * the *Miranda-Edwards* 'Fifth Amendment' right to counsel," the Court stated that the "presum[ption]" of involuntariness that it recognized in *Edwards* is based on the "assump[tion]" that "there has been no break in custody" between the two episodes of custodial interrogation. *Id.* at 177.

2. The decisions of the lower courts are in accord with this Court's statement in *McNeil*. As the court of appeals acknowledged, "[v]irtually every court that has considered this issue has held (or noted in *dicta*) that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver." Pet. App. 29a (quoting Marcy Strauss, *Reinterrogation*, 22 Hastings Const. L.Q. 359, 386 (1995)); see *id.* at 17a n.6 (citing cases); see also *Kyger* v. *Carlton*, 146 F.3d 374, 380 (6th Cir.) (stating that "courts have unanimously" held that "*Edwards* does not * * * apply to suspects who * * * are not in continuous custody"), cert. denied, 525 U.S. 1028 (1998).

3. The consensus that the *Edwards* presumption terminates when there is a break in custody is consistent with the underlying premises of this Court's decisions. *Miranda* was based on the "inherently compelling pressures" that exist during "*the process of* in-custody interrogation," and the Court stated that one of the chief sources of that pressure was "an interrogator's imprecations, whether implied or expressly stated, that the interrogation *will continue* until a confession is obtained."

384 U.S. 467-468 (emphases added). *Edwards*, in turn, concluded that it was "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to *reinterrogate* an accused *in custody* if he has clearly asserted his right to counsel." *Edwards*, 451 U.S. at 485 (emphases added).

The Court's post-*Edwards* decisions also contemplate a suspect who remains in continuous *Miranda* custody. In *Roberson*, the Court held that *Edwards* applies "[w]hether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation." 486 U.S. at 687. *Roberson* expressly relied on "the presumption of coercion that is created by *prolonged police custody*," which it concluded "does not disappear simply because the police have approached the suspect, *still in custody*, still without counsel, about a separate investigation." *Id.* at 683, 686 (emphases added).

In *Minnick*, the Court held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." 498 U.S. at 153. The Court explained that "[a] single consulation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that *accompany custody* and that may increase *as custody is prolonged*." *Ibid.* (emphases added).

To be sure, *Edwards*, *Roberson*, and *Minnick* also contain language that could be read to suggest that the *Edwards* presumption, once triggered, lasts forever. See, *e.g.*, *Minnick*, 498 U.S. at 153; *Roberson*, 486 U.S. at 680-682; *Edwards*, 451 U.S. at 484-485. But "words

of * * * opinions are to be read in the light of the facts of the case." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); see *Mosley*, 423 U.S. at 101 (acknowledging that a passage in *Miranda* "could be literally read to mean that a person who has invoked his 'right to silence' can never again be subjected to custodial interrogation by any police officer at any time or place on any subject," but rejecting that interpretation because it "would lead to absurd and unintended results"). And in each of those cases, the suspect was a pretrial arrestee who had remained in continuous custody from the time he invoked his Fifth Amendment right to counsel until the police reapproached him. See *Minnick*, 498 U.S. at 148-149; *Roberson*, 486 U.S. at 678-679; *Edwards*, 451 U.S. at 478-479.

4. A break in custody does not, of course, establish that a suspect now wishes to speak with the police or that any waiver of his right to have counsel present during a subsequent custodial interrogation is voluntary. Rather, a break in custody matters because it constitutes a sufficiently significant change in circumstances as to make inappropriate an irrebuttable presumption to the contrary.

Even following a break in custody, a suspect who is to be interrogated anew still enjoys "the primary protection afforded suspects subject to custodial interrogation"—"the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460.[2] If the suspect continues to view himself as

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[2] Under current law, once formal charges are initiated, the Sixth Amendment independently bars the police from approaching the defendant about the charged offense if he has requested counsel at an arraignment or similar proceeding. See *Michigan* v. *Jackson*, 475 U.S. 625 (1986). On March 30, 2009, this Court entered an order in *Montejo* v. *Louisiana*, No. 07-1529 (argued Jan. 13, 2009), directing the parties

unable "to cope with the pressures of custodial interrogation" without legal assistance, *Roberson*, 486 U.S. at 686, he need only do something he already has done and invoke his Fifth Amendment right to counsel, which would reactivate the *Edwards* presumption.[3]

C. Respondent Experienced A Break In Custody In This Case

The court of appeals determined that it need not decide whether the *Edwards* presumption terminates upon a break in custody. Instead, it held that respondent "was held in continuous custody" for purposes of the *Edwards* rule during the more than two-and-a-half years that separated the August 7, 2003 and March 2, 2006 interviews. Pet. App. 31a. That is incorrect.

As the majority of lower courts that have considered the question have held,[4] the mere fact of incarceration

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to address the following question: "Should Michigan v. Jackson, 475 U.S. 625 (1986), be overruled?" The government has submitted an amicus brief in *Montejo* supporting the overruling of *Jackson*.

[3] In *Minnick*, the Court declined to hold that the *Edwards* presumption terminates whenever a suspect who has remained in continuous custody has consulted with an attorney. Among other reasons, the Court stated that such a rule "would undermine the advantages flowing from *Edwards*' 'clear and unequivocal' character" and create "a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment." *Minnick*, 498 U.S. at 154-155. Adopting a break-in-custody rule would not undermine the advantages of treating *Edwards* as a clear rule because the question whether a suspect is in *Miranda* custody arises in every *Edwards* case, and the inquiry is no more difficult as to periods before the most recent interrogation than as to the time of the interrogation itself. And determining whether *Edwards*' protection revived would simply require determining whether the suspect unequivocally invoked the right to counsel under *Davis*.

[4] See *Tawfeq Saleh* v. *Fleming*, 512 F.3d 548, 551 (9th Cir. 2008); *United States* v. *Newton*, 369 F.3d 659, 670 (2d Cir.), cert. denied, 543

does not establish protracted and continuous "custody" for purposes of *Miranda* or *Edwards*. Rather, a person serving a prison sentence is not "in custody" for purposes of those decisions unless he is subject to some additional restraint beyond that inherent to incarceration. The court of appeals did not find that respondent was subject to any such additional restraints following the August 7, 2003 interview. And here, the conclusion that a break in custody occurred is further confirmed by the passing of more than two-and-a-half years before respondent was again subjected to custodial interrogation.

1. a. This Court has stated that determining whether a person is in custody for purposes of *Miranda* requires an examination of "all of the circumstances surrounding the interrogation." *Stansbury* v. *California*, 511 U.S. 318, 322 (1994). The Court has described the general inquiry as "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (internal quotation marks and citation omitted). In making that assessment, however, it is necessary "to separate the restrictions on [a suspect's] freedom arising from police interrogation and those incident to his background circumstances." *United States* v. *Jamison*, 509 F.3d 623, 629

U.S. 947 (2004); *United States* v. *Arrington*, 215 F.3d 855, 856-857 (8th Cir. 2000); *United States* v. *Menzer*, 29 F.3d 1223, 1230-1233 (7th Cir.), cert. denied, 513 U.S. 1002 (1994); *Garcia* v. *Singletary*, 13 F.3d 1487, 1490-1491 (11th Cir.), cert. denied, 513 U.S. 908 (1994); *United States* v. *Hall*, 905 F.2d 959, 962 (6th Cir. 1990); *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); see also Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 936-939 & n.183 (1997) (citing additional cases).

(4th Cir. 2007). Cf. *Florida* v. *Bostick*, 501 U.S. 429, 435-436 (1991) (whether a bus passenger is "seiz[ed]" for Fourth Amendment purposes does not depend on whether the passenger is "free to leave" in a general sense but on the "principle that those words were intended to capture"; that the passenger independently wishes to remain on the bus does not signify police coercion).

In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court held that roadside questioning during a traffic stop does not constitute "custodial interrogation" that triggers an officer's obligation to give the *Miranda* warnings. *Id.* at 435-442. The Court did not deny "that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers," *id.* at 436, but it determined that "[f]idelity to the doctrine announced in *Miranda*" required its application only in "situations in which the concerns that powered the decision are implicated," *id.* at 437.

In *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), the Court held that *Miranda* warnings are unnecessary before "a statement made by a probationer to his probation officer * * * is admissible in a subsequent criminal proceeding." *Id.* at 425. The Court recognized that the probation officer had the power to "compel Murphy's attendance and truthful answers" and had "consciously sought incriminating evidence." *Id.* at 431. The Court also noted that Murphy "would be regarded as 'in custody' for purposes of federal habeas corpus." *Id.* at 430. But the Court stated that "custody for *Miranda* purposes has been more narrowly circumscribed," *ibid.*, and it determined that "[e]ven a cursory comparison of custodial interrogation and probation interviews reveal[ed]

the inaptness of the Minnesota Supreme Court's analogy to *Miranda*," *id.* at 433.

b. Respondent ceased to be "in custody" for purposes of either *Miranda* or *Edwards* when Detective Blankenship terminated the August 7, 2003 interview and respondent was returned to the general prison population to continue serving his sentence on the unrelated charge. Respondent of course continued to experience severe restraints on his liberty at that point. But those restraints were not the product of any "process of incustody interrogation." *Miranda*, 384 U.S. at 467. Rather, they were "incident to [respondent's] background circumstances." *Jamison*, 509 F.3d at 629.

The situation of a person who is serving a sentence of incarceration differs significantly from that of a person who is detained pending an investigation. The prisoner has not been "swept from familiar surroundings" and "thrust into an unfamiliar atmosphere" that was "created for no purpose other than to subject the individual to the will of his examiner." *Miranda*, 384 U.S. at 457, 461. To the contrary, for someone who is already serving a prison sentence, "incarceration * * * is an accustomed milieu." *Isaacs* v. *Head*, 300 F.3d 1232, 1266 (11th Cir. 2002), cert. denied, 538 U.S. 988 (2003). A prisoner also understands that his incarceration will continue whether or not he submits to interrogation about another crime. In that respect, too, he is far different from a person who has been detained for investigatory purposes, who may be vulnerable to the suggestion that his detention and accompanying interrogation will continue unless and until he confesses. See *Minnick*, 498 U.S. at 153; *Miranda*, 384 U.S. at 468; see also *Roberson*, 486 U.S. at 686 (referring to "the presumption

of coercion that is created by prolonged *police* custody") (emphasis added).

c. The court of appeals erred in concluding that "[a]ny 'break in custody' exception to *Edwards* * * * must mean something different than the test for determining custody for purposes of *Miranda* warnings." Pet. App. 38a. *Edwards* is a "corollary to *Miranda*[,]" which "implement[s]" *Miranda*'s protections against "the 'inherently compelling pressures' *of custodial interrogation*." *Roberson*, 486 U.S. at 680-681 (emphasis added) (quoting *Miranda*, 384 U.S. 467). It is logical to use the same definition of "custody" for purposes of both the rule and its corollary, and a break-in-custody limitation on *Edwards* would make little sense if it were untethered from its *Miranda* moorings. In both *Minnick* and *Roberson*, moreover, the Court used the term "custody" to describe not only the process of interrogation itself but also periods of detention that are related to and accompany that questioning. See p. 13, *supra*.

d. The approach adopted by the court of appeals would also create significant barriers to effective law enforcement. People who are already incarcerated for one crime frequently become suspects in another. Under this Court's holding in *Roberson*, however, "[t]he *Edwards* rule * * * is *not* offense specific," meaning that "[o]nce a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil*, 501 U.S. at 177. In addition, prisons are even less likely than police stations to "have a '[prison] lawyer' present at all times to advise prisoners." *Miranda*, 384 U.S. at 474. A holding that all prison inmates are in continuous custody for *Edwards* pur-

poses would risk making an entire category of inmates—*i.e.*, those who asserted the right to counsel during interrogation while serving their sentences—unapproachable for the duration of their often lengthy incarceration. Like *Miranda* itself, *Edwards* cannot "sensibly be read to create a *per se* proscription of indefinite duration." *Mosley*, 423 U.S. at 102.

The court of appeals' holding would also create significant administrative problems. Prisoners are often transferred from one jail or prison to another, and agents of various local, state, or federal law enforcement agencies may wish to speak with them at different points during their incarceration. It is one thing to require police officers to find out whether a suspect has invoked his Fifth Amendment right to counsel at some point in the relatively recent past while being held as a prearraignment detainee. See *Roberson*, 486 U.S. at 687-688. It is quite another thing to require police to determine whether someone who is serving a long prison sentence has ever validly invoked his Fifth Amendment right to counsel at any time, in any place, and to any law enforcement official during a period of continuous incarceration.[5]

e. A person who is serving a prison sentence can, of course, be placed "in custody" for purposes of *Miranda* and *Edwards* when he is subject to custodial interrogation. See *Mathis* v. *United States*, 391 U.S. 1 (1968); see also, *e.g.*, *United States* v. *Chamberlain*, 163 F.3d 499, 503-504 (8th Cir. 1999) (holding that *Miranda* warnings

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[5] In this case, Detectives Blankenship and Hoover worked for the same police department and respondent's invocation of his Fifth Amendment right to counsel was noted in Detective Blankenship's report of the August 7, 2003 interview. Pet. App. 2a-3a. Neither of those features, however, will invariably, or even typically, be present.

were required where a prisoner was escorted to a "secure area" for questioning in a "police dominated" atmosphere). The State has not denied that respondent was "in custody" for purposes of both *Miranda* and *Edwards* during the August 7, 2003 and March 2006 interviews and that he was subject to "interrogation" during those times. Following the August 7, 2003 interview, however, respondent was returned to the general prison population, and nothing in the record suggests that he was subjected to any restrictions beyond those that generally accompany incarceration. As a result, respondent ceased to be "in custody" for purposes of *Miranda* and *Edwards* at that point, and the *Edwards* presumption terminated.[6]

2. If there were any doubt that respondent experienced a break in custody in this case, the two-and-a-half years that elapsed between the August 7, 2003 interview and any further interrogation would eliminate it. In *Edwards*, officers reinitiated interrogation the day after

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[6] In *United States* v. *Green*, 592 A.2d 985 (D.C. App. 1991), cert. granted, 504 U.S. 908 (1992), cert. dismissed, 507 U.S. 545 (1993), the United States conceded before the District of Columbia Court of Appeals "that defendant * * * was in continuous custody for purposes of the *Edwards* prophylactic rule" during a five-month period between his initial invocation of his Fifth Amendment right to counsel and his subsequent confession. *Id.* at 988 (quoting government's brief); accord 11/30/92 Tr. of Oral Arg. at 7, *United States* v. *Green*, *supra* (No. 91-1521) (counsel for the government agreeing that the defendant "had been in custody" during the relevant period). The defendant in *Green*, however, was not serving a sentence of incarceration during that period; rather, he was being held in connection with various *pending* charges. See 592 A.2d at 985-986; see also *id.* at 990 n.8 (declining to decide "whether different considerations would [have] come into play if the defendant" had been "transferred to the general prison population following imposition of sentence").

the suspect invoked his right to counsel, see 451 U.S. at 479; in *Roberson* and *Minnick*, the gap was three days, see *Minnick*, 498 U.S. at 148-149; *Roberson*, 486 U.S. at 678. See also *Solem*, 465 U.S. at 641-642 (assuming that police officers violated *Edwards* when they twice reinitiated custodial interrogation within one day after the suspect invoked his right to counsel). Although the Court of Appeals of Maryland acknowledged that "[m]any courts have used the length between interrogations as one relevant factor in considering whether a break in custody exists," Pet. App. 26a n.10, the court erred in declining to assign any weight to that factor in reaching its decision, see *id.* at 41a.

As already explained, a person can be "in custody" for purposes of both *Miranda* and *Edwards* even though he is not being subjected to interrogation at that particular moment. See p. 19, *supra*. But because it is the combination of interrogation *and* custody that creates the pressures that *Miranda* is designed to counteract, the absence of any anticipated or near-term prospect of questioning is highly relevant in assessing whether a genuine break in custody exists.

This Court's concern in both *Miranda* and *Edwards* "was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island* v. *Innis*, 446 U.S. 291, 299 (1980) (quoting *Miranda*, 384 U.S. at 457-458). That observation formed the context for this Court's statement in *Roberson* that, "to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacer-

bate whatever compulsion to speak the suspect may be feeling." 486 U.S. at 686.

In contrast, when a prisoner knows he will remain incarcerated whether or not he confesses, a prolonged period during which no interrogation occurs will serve to dissipate the kind of coercive pressures on which *Miranda* is premised. That is particularly so where, as here, the previous interrogation ended without any indication that it would be renewed. See Pet. App. 3a-4a (noting that respondent "expressed his surprise at the renewed questioning on the matter involving his son"). A person who has resumed serving a sentence for an unrelated crime, and has not been approached about other allegations of criminal wrongdoing for more than two-and-half years following his invocation of his Fifth Amendment right to counsel will hardly be badgered into waiving that right simply because a different officer tries to initiate a conversation about those allegations after providing a fresh set of *Miranda* warnings. See Pet. App. 64a ("Two interrogations in two years is not 'badgering.'").[7]

---

[7] This case presents no occasion to consider whether a break in custody that is extremely brief or provided for the express purpose of terminating the *Edwards* presumption would warrant a different approach. Cf. *Missouri* v. *Seibert*, 542 U.S. 600 (2004). In this case, Detective Hoover was unaware that respondent had invoked his Fifth Amendment right to counsel in the meeting with Detective Blankenship. See Pet. App. 2a-3a & n.1, 86a.

CONCLUSION

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

vs.

MICHAEL BLAINE SHATZER,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the rule of *Edwards* v. *Arizona* (that the police cannot initiate contact and request a *Miranda* waiver from a suspect in custody who has invoked his right to counsel) apply in a case where (1) over two years have elapsed between the prior invocation and the subsequent contact, and (2) the suspect was not in police custody but rather sentenced to state prison for an unrelated offense?

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IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

vs.

MICHAEL BLAINE SHATZER,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the admissibility of a voluntary confession taken with the full warnings and waivers

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

required by *Miranda* v. *Arizona*, under circumstances where there is no substantial reason to believe that the suspect was badgered into making the waiver. Exclusion of such reliable evidence of guilt would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In August 2003, Michael Shatzer was incarcerated in the Maryland Correctional Institution—Hagerstown (MCI-H) for the sexual abuse of a child. *Shatzer* v. *State*, 405 Md. 585, 589, 954 A. 2d 1118, 1120 (2008). The Hagerstown police department was investigating allegations that Shatzer had also sexually abused his three-year-old son. *Ibid.* Shatzer allegedly ordered his son to perform fellatio on him. *Ibid.* The detective assigned to the case, Detective Shane Blankenship, interviewed the son. See Pet. for Cert. 3.

Detective Blankenship then went to MCI-H to interview Shatzer. *Shatzer*, 405 Md., at 589, 954 A. 2d, at 1120. Shatzer initially waived his *Miranda* rights, but later he invoked them and told Detective Blankenship "he would not talk about this case without having an attorney present." *Ibid.* The interview ended, and the police closed their investigation in 2003. *Ibid.*

About two and a half years later, in February 2006, Shatzer's son was "able to make more specific allegations" against his father. *Ibid.* As part of the new investigation, Detective Paul Hoover went to interview Shatzer at the Roxbury Correctional Institution where Shatzer was then incarcerated. 405 Md., at 589-590, 954 A. 2d, at 1120-1121. Shatzer had been incarcerated for the duration of time between his first and second interrogation. *Ibid.* Detective Hoover was aware that Shatzer had been investigated for the sexual abuse of his son before, Pet. for Cert. 4, but no one advised

Detective Hoover that in 2003 Shatzer had asked for an attorney. Pet. for Cert. 5; 405 Md., at 589, n. 1, 954 A. 2d, at 1120, n.1.

Detective Hoover explained that a new investigation into the allegations had begun and advised Shatzer of his *Miranda* rights. 405 Md., at 590, 954 A. 2d, at 1121. Shatzer waived his right to an attorney and his right to remain silent. *Ibid.* He admitted to masturbating in front of his son from a distance of about three feet away. *Ibid.* He denied that fellatio had taken place. *Ibid.* At the end of the interview, Shatzer agreed to undergo a polygraph examination. *Ibid.*

Five days later, Detective Hoover and Detective Shawn Schultz met to administer a polygraph examination. *Ibid.* Shatzer was advised of his *Miranda* rights for a third time, and, once again, he waived his rights. *Ibid.* Detective Schultz concluded that Shatzer had failed the exam. *Ibid.* "Shatzer [then] became emotional, started to cry, and said 'I didn't force him. I didn't force him.' At that time, he requested an attorney and the interview stopped." *Ibid.*

Shatzer moved to suppress the statements made during the two interrogations conducted by Detective Hoover. 405 Md., at 590-591, 954 A. 2d, at 1121. He alleged that his request for an attorney in 2003 prohibited further interrogation, without an attorney, in 2006. *Id.*, at 591, 954 A. 2d, at 1121. The trial court denied the motion, finding that "the length of time [for which Shatzer] was incarcerated" had caused a break in custody. *Ibid.* (quoting trial court opinion). Shatzer waived his right to a jury and agreed to a statement of the facts. *Id.*, at 591, 954 A. 2d, at 1122. He was found guilty of child sexual abuse and sentenced to 15 years, with all but 5 years suspended. *Id.*, at 591-592, 954 A. 2d, at 1122. The court relied on statements made during Shatzer's second interrogation to find guilt. *Id.*,

at 591, n. 3, 954 A. 2d, at 1122, n. 3. The court reasoned that because "[t]here is . . . admission of the defendant as to the act of masturbation. The Court finds that that is exploitation based on the version of events given." *Ibid.*

Shatzer appealed to the Court of Special Appeals, but the Maryland Court of Appeals *sua sponte* granted certiorari to consider whether *Edwards* v. *Arizona*, 451 U. S. 477 (1981), required suppression of Shatzer's statements during his second interrogation. 405 Md., at 592, 954 A. 2d, at 1122. Five Judges of the Court of Appeals found that *Edwards* had been violated, and held "that the passage of time *alone* is insufficient to expire the protections afforded by *Edwards*." *Id.*, at 606-607, 954 A. 2d, at 1131. The Court of Appeals also "decline[d] . . . to recognize a 'break in custody' exception to the *Edwards* rule regarding an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation when the interrogation relates to the same investigation." *Id.*, at 618, 954 A. 2d, at 1137. Judges Harrell and Cathell dissented. Writing for the dissent, Judge Harrell relied on both the passage of time and the distinction between police and correctional custody as reasons not to apply *Edwards* to this case. See *id.*, at 619-620, 637, 954 A. 2d, at 1139, 1149. This Court granted certiorari on January 26, 2009.

SUMMARY OF ARGUMENT

Precedent does not require this Court to apply *Edwards* to the present case. Extension of *Edwards'* protection is not dictated by precedent and will not prevent the inherently coercive police practices condemned in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Edwards* v. *Arizona*, 451 U. S. 477 (1981). Extend-

ing *Edwards* to the present case will add another layer of prophylaxis to a situation where it is unclear whether there has been a constitutional violation. This Court should mark a clear limit to the reach of *Edwards*' prophylactic rule.

To define the scope of the *Edwards* rule, this Court should consider the limited benefit of extending its presumption to a case where the risk of coercion is remote. In the present case, extending *Edwards*' prophylactic rule would suppress valid confessions without deterring abusive police practices. This is an incorrect result. Extension of the rule cannot be justified when it would reach an incorrect result most of the time.

The correct result can be achieved by adhering to *Edwards* only when adherence furthers the purpose of *Edwards*. At the heart of the *Edwards* rule is the desire to protect the accused from police badgering and compelled self-incrimination. The rule was adopted to strengthen *Miranda*'s protection from compelled self-incrimination in the inherently coercive confines of police custody. As the length of time between two custodial interrogations increases, the reasons to presume that the accused was badgered into a waiver diminishes. Similarly, where the accused has been removed from the custody of his interrogator and is placed in the custody of a state prison, there are few reasons to presume the accused confessed in order to escape from the confines of his interrogator. The *Edwards* presumption should be limited to situations that present a genuine and substantial danger of badgering.

The present case is an example of a situation where that danger is remote. Both of Shatzer's interrogations took place outside of the confines of police custody, and his second interrogation took place two years and seven

months after his first interrogation. Neither interrogation supports a presumption that Shatzer confessed because he believed a confession would remove him from an inherently coercive interrogation or from police custody. This case can be decided either on the basis that the *Edwards* rule is "time-tethered," *United States* v. *Green*, 592 A. 2d 985, 989 (D. C. 1991), cert. dismissed as moot, 507 U. S. 545 (1993), or that *Edwards* does not apply to a suspect held in prison custody.

It is time to establish a specific cut off for *Edwards*' presumption that all confessions obtained in custody are coercive. The presumption has limited courts' ability to achieve justice for the accused and the accuser. This Court's precedent does not require silencing a validly obtained confession simply because more than two years earlier the accused asked for counsel, and he has remained in prison custody since that day. The *Edwards* presumption should be limited, and a valid *Miranda* waiver during the second interview should be sufficient.

ARGUMENT

I. The durational requirement of *Edwards* is an open question not dictated by precedent.

"The issue of whether the passage of time could terminate the protection of *Edwards* remains an open question." *Shatzer* v. *State*, 405 Md. 585, 605, 954 A. 2d 1118, 1130 (2008). On this point, the Court of Appeals could not have said it any better. The issue is before this Court as a matter of first impression. The answer is not dictated by precedent.

The "established rule" of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), does not necessarily apply here. In *Edwards*, the Court was presented with a second

interrogation the next morning, *id.*, at 479, and in *Arizona* v. *Roberson*, 486 U. S. 675, 686 (1988), the interval was only three days. Where there has been a long lapse of time between the first and second interrogation, there is less reason to presume police badgering and coercion. Expansion of *Edwards*' bright-line rule into this new territory requires justification. Cf. *id.*, at 688 (Kennedy, J., dissenting).

Butler v. *McKellar*, 494 U. S. 407 (1990), instructs that *Edwards* is not an infinitely elastic command that must be applied in every custodial interrogation. Where the facts do not support application of *Edwards*, or where the facts differ significantly, courts are not bound to strict adherence to *Edwards*' precedent.

In *Butler*, this Court considered whether *Roberson* had created a "new rule" for the purpose of the habeas retroactivity limitation of *Teague* v. *Lane*, 489 U. S. 288 (1989). See *Butler*, 494 U. S., at 414-415. This Court rejected Butler's argument that unquestioning adherence to *Edwards* was necessary because the *Roberson* Court "believed Roberson's case to be within the 'logical compass' of *Edwards*." *Ibid.* The rejection made it clear that the words " 'controlled' or 'governed' " do not necessarily make a new decision a mere application of the existing rule. *Id.*, at 415. Instead, the language leaves open the possibility that a court may either decide to extend an existing rule into previously uncharted territory or decline to do so.

The *Butler* Court reasoned that although courts frequently view their decisions as " 'controlled' or 'governed' by prior opinions" they are often aware of reasonable contrary conclusions reached by other courts. *Ibid.* This meant that, in some cases, the reach of a bright-line rule might be the subject of reasonable disagreement until the boundary is marked by the court of last resort. When this Court decided *Roberson*, it

marked the outer boundary. In *Butler*, the Court acknowledged that it would not have been illogical to decline to extend *Edwards* to the facts of *Roberson*. *Ibid.* It was evident from the manner in which lower courts had applied both *Edwards* and *Roberson* that *Edwards* had not dictated the outcome of the *Roberson* issue. *Ibid.*

In the present case, as in *Roberson*, the question is whether to expand the *Edwards* rule to a situation with a large factual difference from *Edwards*, a difference which substantially weakens the argument for a *per se* rule. See *Roberson*, 486 U. S., at 693 (Kennedy, J., dissenting). This Court has yet "to rule on" whether "the passage of time *alone*" is sufficient to expire the protections of *Edwards*. *Shatzer*, 405 Md., at 606-607, 954 A. 2d, at 1131 (emphasis in original). Because precedent alone does not answer the question, the underlying policies require close examination.

II. Presumptions and bright-line rules should not be extended into circumstances where they often produce erroneous conclusions.

This Court has noted the dangers of excessive use of conclusive presumptions. See *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991). The state court's decision in the present case treats the *Edwards* presumption as an absolute, applicable all of the time. See *Shatzer* v. *State*, 405 Md. 585, 606-607, 954 A. 2d 1118, 1131 (2008). Such presumptions, however, are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman*, *supra*, at 737. "*Per se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter . . . ." *Ibid.*

An incorrect result is reached when the *Edwards* presumption is applied to forbid police-initiated contact merely because years earlier the accused requested an attorney. In this case, the presumption has little do with factfinding or the accused's fear that he is "unable to deal with the pressures of custodial interrogation without legal assistance." *Arizona* v. *Roberson*, 486 U. S. 675, 683 (1988). After a significant lapse in time between two interrogations, a presumption that the accused still feels "pressures of custodial interrogation" is unwarranted. If the accused waives his *Miranda* rights, he has demonstrated that he feels comfortable answering questions during his second interrogation, and it is highly unlikely this waiver is the result of "badgering" when two years have elapsed. Common sense contradicts the result that application of *Edwards* would compel. Adoption of the *Edwards* presumption will not "achieve the correct result in almost all cases[,]" but just the opposite. Cf. *Coleman*, 501 U. S., at 737.

In cases where there has been a significant lapse of time between the police honoring the accused's right to speak with his attorney and a new contact initiated by the police, the correct conclusion is reached by applying *Miranda* alone. That is, *Miranda* should be applied in the same manner as for an initial interrogation. In his second interrogation, the accused has had time to become familiar with the restraints of custody and is less likely to become the victim of custodial pressure. See Kassin, The Psychology of Confessions, 4 Annual Rev. L. Soc. Sci. 193, 201-202 (2008). His waiver of *Miranda* rights can be assessed as voluntary or not based on all the circumstances, instead of presuming it was the result of coercion. A presumption that a waiver is coerced rather than voluntary is unwarranted.

Extension of the *Edwards per se* rule to the present case would produce an erroneous result most of the time. The record before this Court does not demonstrate predicate facts of coercion or abuse that warrant presuming police badgering, or " 'inherently compelling pressures' of custodial interrogation." Cf. *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). Not only is the presumption unnecessary, but it undercuts the truth-finding function of a valid *Miranda* waiver. Extending *Edwards* will immunize the accused from re-interrogation regardless of whether it occurs two hours, two days, or 2,000 days after his request. Immunization will occur not because police actually badgered him into waiving, but merely because he is able to establish he was in custody and had previously invoked counsel. In a case like Shatzer's, where custody is undisputed, the more important question is whether it may be presumed that his waiver was obtained through repeated questioning and intimidation. The only fact supporting that argument here is that Shatzer remained in prison for two years and seven months.

Shatzer's proposed application of *Edwards* is analogous to inferences this Court has held unconstitutional for lack of a rational connection between the facts proved and the facts presumed. See, *e.g.*, *Tot* v. *United States*, 319 U. S. 463, 464, 467-468 (1943) (receipt of firearms in interstate commerce presumed from simple possession). The marijuana case of *Leary* v. *United States*, 395 U. S. 6 (1969), for example, dealt with a statute that presumed that simple possession of marijuana was "sufficient evidence to authorize conviction" for smuggling, receiving, concealing, buying, or selling of a drug, knowing it had been illegally imported. *Id.*, at 10, n. 1. This Court invalidated the statutory inference "unless it can at least be said with substantial assurance that the presumed fact is more

likely than not to flow from the proved fact on which it is made to depend." *Id.*, at 36.

Under Shatzer's proposed rule, coercion of the waiver would be presumed, a presumption that would preclude the State from using reliable evidence of the accused's guilt. This should not be the rule when the State has followed all of *Miranda*'s guidelines and the totality of the circumstances does not support a finding of actual coercion. When the State has waited a significant period of time between the first interrogation and the second interrogation, there is no reason to presume the second interrogation was an attempt to badger the accused into giving an involuntary confession. If it was unfair for the Government to employ a counterfactual presumption in *Leary* and *Tot*, it is similarly unfair for the accused to do so here. The facts are too attenuated to make the leap. If justice is due to the accuser as it is to the accused, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934), this Court should not impose on the people the kind of presumption it would not permit the people to impose on the defendant.

Edwards was intended to give full meaning to the *Miranda* protection, and *Arizona* v. *Roberson* provides the rationale behind continued application of *Edwards*: "the prophylactic protections that *Miranda* warnings provide to counteract the 'inherently compelling pressures' of custodial interrogation and to 'permit a full opportunity to exercise the privilege against self-incrimination . . . .' " *Roberson*, 486 U. S., at 681. That purpose is ill-served by extending *Edwards*' presumption into territory where the presumed fact is usually false.

III. The purpose of *Edwards* must be kept in mind when determining how far it should extend.

Edwards "established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990). We should not lose sight of the fact that the actual constitutional right involved is the right not to be compelled to be a witness against oneself. See U. S. Const., Amdt. 5. The *Miranda* rule is secondary, and the *Edwards* rule is tertiary. In *Davis* v. *United States*, 512 U. S. 452, 462 (1994), this Court declined to create "a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." Similar restraint is in order here.

Miranda's bright line was established to protect the accused from compelled self-incrimination during a custodial interrogation. It was decided with reference to interrogation techniques that "[i]n essence," allowed secret, incommunicado, and inherently coercive interrogation practices. See *Miranda* v. *Arizona*, 384 U. S. 436, 455 (1966). "The presence of counsel" could serve as an "adequate protective device necessary to make the process of interrogation conform with the dictates of the [Fifth Amendment] privilege[,]" *id.*, at 466, but sometimes its protection is not necessary. In some cases, warnings and a waiver will be sufficient.

By its terms, *Miranda* prohibits the prosecution from using statements "stemming from custodial interrogation of the defendant" unless the warning and waiver procedure is followed. *Id.*, at 444-445. Caution is in order when applying this sweeping rule, bearing in mind that "[a]ll rights tend to declare themselves absolute to their logical extreme." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908)

(Holmes, J.). If *Miranda* were applied to the logical extreme of its language, it would needlessly exclude evidence far removed from its purpose. This Court has not applied it that way, but instead has recognized limitations that admit evidence when the literal wording of *Miranda* would seem to call for its exclusion.

This Court declined to apply *Miranda* literally in *Illinois* v. *Perkins*, 496 U. S. 292 (1990). In *Perkins*, a *Miranda* exception was allowed for an undercover officer posing as a fellow inmate. The exception was allowed because while *Miranda* must be strictly enforced, its enforcement is not necessary in situations that do not "implicate the concerns underlying *Miranda*." *Id.*, at 296. Although *Miranda* found the Fifth Amendment privilege against self-incrimination to prohibit admission of unwarned statements made during a custodial interrogation, there was no reason to apply *Miranda* where "the essential ingredients of a 'police dominated atmosphere' and coercion" were lacking. *Ibid.* See also *infra*, at 24, 28 (discussing *Berkemer* v. *McCarty* and *Perkins*).

Before *Edwards*, in *Michigan* v. *Mosley*, 423 U. S. 96 (1975), this Court found it "evident" that some "literal interpretations" of passages from *Miranda* "would lead to absurd and unintended results." Mosley had been arrested for two robberies. *Id.*, at 97. At the first interview, "[w]hen Mosley said he did not want to answer any more questions about the robberies, [the detective] promptly ceased the interrogation." *Ibid.* A few hours later, another detective sought to question Mosley about a murder unrelated to the robberies and "carefully advised him of his *Miranda* rights." *Id.*, at 98. In reaching its decision, this Court recognized that the validity of *Miranda*'s "so-called guidelines" was not at issue, but the passage of *Miranda* stating that "interrogation must cease" if the suspect invokes his

rights left open the question of whether the officers had violated the guideline in Mosley's case. See *id.*, at 100-101. The Court noted two extreme interpretations of this passage. *Id.*, at 102.

> "To permit continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements . . . would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Ibid.*

The Court declined to interpret *Miranda* to require either extreme position. Neither the passage noted above "nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription *of infinite duration* upon further questioning by an officer on any subject, once the person in custody has indicated a desire to remain silent." *Id.*, at 102-103 (emphasis added).

Arizona v. *Roberson*, 486 U. S. 675, 683 (1988), distinguished *Mosley* by drawing the line between suspects who assert the right to have counsel during interrogation and those who assert the right not to be interrogated at all. It is far from self-evident that the former group is in greater danger of being badgered into a subsequent waiver. This dubious distinction should not be compounded by making it perpetual.

In Shatzer's two interrogations, his Fifth Amendment rights were scrupulously honored. The first officer complied with *Miranda*'s bright-line rule and advised Shatzer of his rights. When Shatzer indicated

he wanted to speak with an attorney, Detective Blankenship honored the *Edwards* rule. There is no evidence that Shatzer was badgered, and the notion that a second request for a waiver years later is somehow more coercive than an initial request strains credulity. In Shatzer's case, and others with similar facts, the purpose of *Miranda* has been served. There is no need to "create a *per se* proscription of infinite duration upon further questioning by any police officer . . . ." *Mosley*, 423 U. S., at 102-103.

IV. *Edwards'* bright-line rule should not be one of infinite duration.

A. The Value of Confessions.

Permitting *Edwards'* presumption to apply indefinitely diminishes public safety with little offsetting benefit. Instead of treating police interrogation as a public good, such a rule would treat interrogation as if it were a necessary evil. Without interrogation, "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). When a confession is freely given, excluding it from evidence at the expense of public safety is a disservice to justice. See *United States* v. *Washington*, 431 U. S. 181, 187 (1977); *Oregon* v. *Elstad*, 470 U. S. 298, 312 (1985).

Confessions obtained through noncoercive interrogation have always been a "proper element in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966). Historically, when it was clear that the confession was voluntary, it was admissible as important, valid evidence. See *Dickerson* v. *United States*, 530 U. S. 428, 433 (2000). To be sure, custody does play a big role in securing confessions. The isolation and control brought

to bear on the accused during custody have been found to place considerable strain on a suspect. See *Miranda*, *supra*, at 455. In cases of extended prison custody, however, the "weakness of individuals" that custody is believed to prey upon fades as the accused becomes more familiar with both his surroundings and law enforcement. In cases of extended custody, voluntariness can still be found.

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Schneckloth*, 412 U. S., at 225-226 (quoting *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961)).

Of course "voluntariness" is not as easy to put into practice as it is to put down on paper. Communications between suspects and police are common, and it is not always clear if a statement is voluntary. Even so, this Court has allowed confessions obtained if the accused spontaneously changes his mind about speaking to police without an attorney, see *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981), as well as confessions for crimes where the right to an attorney had not attached. *Illinois* v. *Perkins*, 496 U. S. 292, 299 (1990). This Court has generally "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case," *Michigan* v. *Mosley*, 423 U. S. 96, 109 (1975) (White, J., concurring) (citing *Faretta* v. *California*, 422 U. S. 806 (1975)), and in Shatzer's case there is no justification for doing so.

B. A Bright-Line Limit to a Bright-Line Rule.

Edwards created the bright line that interrogation must cease unless the defendant reinitiates interrogation. *Edwards*, 451 U. S., at 484-485. Most of the time, that bright line has produced satisfactory, or at least acceptable, results. In a limited number of cases, however, lower courts have struggled with how to apply *Edwards*' bright line. See *Shatzer* v. *State*, 405 Md. 585, 606, n. 10, 954 A. 2d 1118, 1130, n. 10 (2008); see also *Kochutin* v. *State*, 813 P. 2d 298, 304 (Alaska App. 1991). Put differently, it is impossible to apply the bright-line rules of *Miranda* and *Edwards* to every interrogation. They are bright-line rules that make it easier to decide the Fifth Amendment issue, but, like all bright-line rules, they require bright-line limits.

The advantage of bright-line rules is that they ease the cost of excessive inquiry into the specific facts of similar cases. See *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991). *Miranda*, for example, "changed the focus of much of the inquiry" from whether a confession was voluntary to whether the police complied with the *Miranda* guidelines. *Dickerson*, 530 U. S., at 434-435. The *Miranda* rule does not always bar the admission of confessions made during custodial interrogations where the warnings were not given. As we have seen, the bar is not universally applied. See Part III-B, *supra*. *Miranda*'s bright-line rule has some bright-line limits.

Edwards' secondary bright line establishes that statements are inadmissible once the accused asks for an attorney, unless the accused re-initiates conversa-

tion. *Edwards*, 451 U. S., at 484-485.[2] *Amicus* proposes that it is now time for this Court to establish a bright-line time limit for the application of *Edwards*. In cases where the accused has remained in custody and there has been a significant lapse in time between invocation of the right to counsel and a second interrogation, a specific cutoff should be established to minimize the incorrect holdings that would occur from perpetual application of the *Edwards* presumption. An established time limit for the *Edwards* presumption will both preserve the benefit of adopting presumptions and reduce the cost of excessive inquiry into factually similar cases.

Edwards' adoption of the "additional safeguard" of counsel unless the "accused himself initiates further communication" would not be jeopardized by a proposed cutoff. *Edwards*, 451 U. S., at 484. Rather, *Edwards*' purpose of providing clarity for both law enforcement and the accused would be preserved. A specific cutoff would strengthen *Edwards* and *Miranda* by providing a concrete guideline to law enforcement, the accused, public defenders, and courts to follow. "A major purpose of the Court's opinion in *Miranda* v. *Arizona*, 384 U. S., at 441-442, was 'to give concrete constitutional guidelines to law enforcement agencies and courts to follow.' " *Arizona* v. *Roberson*, 486 U. S. 675, 680 (1988). If the proposed rule is adopted, law enforcement will be on notice that once a prisoner has asked for counsel, officers must refrain from initiating

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2. In theory, it is possible to resume questioning in the presence of counsel for the suspect, but in practice the presence of counsel means no answers to the questions. See *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (Jackson, J., concurring in the result). For a prisoner such as Shatzer with no pending charges, it is unlikely there is any legal authority to appoint counsel.

a new request for a waiver for a set period of time. The accused's attorney would also be aware that it was possible for the police to ask again after a set number of days had passed. Armed with this information, the attorney could advise his client that if he wished to have counsel present, the accused had to request his attorney's presence in the second interrogation. A bright line would also give courts one more way to assess the voluntariness of a *Miranda* waiver. Instead of speculating over whether lapse of time had eliminated the presumption of coercion, courts would know enough time had passed, and the accused would have to show that his second interrogation was coercive.

A specific cutoff for the *Edwards* presumption would also eliminate the threat of the "tenuous slippery slope" feared by the Maryland Court of Appeals when it issued its opinion. *Shatzer*, 405 Md., at 607, 954 A. 2d, at 1131. The Maryland Court of Appeals feared that by holding the vague standard of "lapse of time" sufficient, "the protections against the coercive pressures of interrogation [would] expire after an indeterminate time period had passed." *Ibid.* But this is easily remedied, and from the opinion in this case forward there would be no question as to what amount of time is sufficient. It is time to establish a new bright line to better preserve the purpose of *Miranda*.

Amicus proposes establishing 30 days as the new bright-line duration of the *Edwards* presumption. Thirty days would provide all of the benefits mentioned above, plus the additional benefit of recency. An interrogation that took place 30 days ago is still fresh in the interrogator's and the defendant's minds, and it is less likely that a new officer will be assigned to the same investigation. In addition, records are less likely to be misplaced.

While 30 days may seem arbitrary, there is significant benefit to its adoption. In the past, this Court has adopted similar guides for other pre-trial procedures where it has found the benefit to outweigh any burden.

County of Riverside v. *McLaughlin*, 500 U. S. 44 (1991), presented this Court with a problem similar to the *Edwards* dilemma posed by the present case. *Gerstein* v. *Pugh*, 420 U. S. 103, 125 (1975), had ruled that States "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.*, at 125. The "promptly after" language was intended to give "proper deference to the demands of federalism" based on the varying criminal procedures of the states, *McLaughlin*, 500 U. S., at 53, but its vagueness had flummoxed lower courts. Some, like the Ninth Circuit in *McLaughlin*, viewed "*Gerstein* as 'requir[ing] a probable cause determination to be made *as soon as the administrative steps incident to arrest were completed,* and that such steps should require only a brief period.' " *Id.*, at 54 (quoting Ninth Circuit opinion). "[A] flurry of systemic challenges" arose in other courts as well. See *id.*, at 56. This litigation had the effect of "putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations," a situation which compelled this Court to set a specific time limit. *Ibid.* A specific time limit was necessary "to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Ibid.* "Taking into account the competing interests articulated in *Gerstein*," this Court established 48 hours as the maximum amount of time *Gerstein* permitted between arrest and the probable cause hearing. *Ibid.*

As cases like the present one illustrate, the time has come for this Court to do the same with the duration of the *Edwards* proscription on police-initiated contact as applied to those who must remain in continuous custody. If *Edwards* continues to prevent "further interrogation" without establishing a cutoff, the duration of the *Edwards pro se* proscription will be infinite. Of those that *Edwards* sought to protect—the accused and the integrity of the criminal justice system—the one that will benefit the most will be the violent offender, imprisoned for a lesser offense, who avoids reinterrogation for his violent crime by invoking his right to counsel once, and then remaining in custody for the duration of his sentence. If the offender serves 20 years, his violent offense will remain unresolved for 20 years. This is not justice. Establishing a time limit would not "run contrary" to the purpose of *Edwards* or *Miranda* and would better serve justice by protecting both the accused and the public. "[S]ubsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling," *Dickerson*, 530 U. S., at 443, and it is time to do the same with *Edwards*.

V. *Edwards* should apply only to those in police custody, not correctional custody.

A. Pretrial v. Correctional Custody.

In addition to the time gap, there is a second distinction between the present case and the precedents supporting exclusion, *Edwards* and *Roberson*. Shatzer was not an arrestee in the custody of police with the power to release him, as Edwards and Roberson were. Shatzer was in the custody of the state corrections department pursuant to a final court judgment. In determining the reach of the *Edwards* v. *Arizona* rule,

it is important to keep in mind that the rule was adopted because "use of Edwards' confession against him at trial" violated his Fifth and Fourteenth Amendment rights "as construed by *Miranda* v. *Arizona*." *Edwards* v. *Arizona*, 451 U. S. 477, 480 (1981). *Miranda*'s interpretation of "custodial interrogation" addressed, with great specificity, police interrogation that took place after being taken into custody. To properly map out the scope of *Edwards*, then, one must look at the practices *Miranda* was intended to prevent.

When understood in *Miranda*'s context, custody should be limited to inherently coercive police station interviews or other custodial situations presenting the same danger. Some degree of overbreadth beyond *Miranda*'s core concerns is warranted in order to preserve the clarity of a bright-line rule, see *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000), but if a discrete, clearly definable class of custody does not present the danger that *Miranda* and *Edwards* were intended to prevent, that category should be excluded from *Edwards*' "second layer of prophylaxis." See *McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991).

The facts surrounding Shatzer's custody suggest a clean, categorical limit to *Edwards*. Shatzer's conviction for an unrelated offense and sentence to state prison meant that he was no longer held in an inherently coercive police station environment. He was not held by the law enforcement officers questioning him, and there is no evidence to support police badgering. This custodial setting is very different from the ones in *Edwards* and *Roberson*, and that difference presents an alternative basis for reinstating the judgment in this case. Should this Court decide not to address this aspect of the custody issue because it is not strictly within the question presented, *amicus* submits that the

issue should be expressly reserved and its resolution left for a later date.

B. The Need for Miranda Warnings.

Miranda provides the fundamentals for the rights of suspects during custodial interrogation. The opinion's discussion of the reason why in-custody interrogations are a threat to the Fifth Amendment privilege against self-incrimination provides a guide for how far its strictures should be extended. See *Miranda*, 384 U. S., at 446-458. The primary concern in *Miranda* was "incommunicado interrogation of individuals in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.*, at 445. The question presented by the present case is whether *Edwards* should be extended to a situation where the danger of an "incommunicado interrogation . . . in a police dominated atmosphere" is remote at best.

Miranda's protections flow from this Court's rejection of police interrogation practices that were advocated in F. Inbau and J. Reid, Criminal Interrogation and Confessions (1962), the leading textbook for training police officers at that time. See *Miranda*, 384 U. S., at 448-449, nn. 9 and 10. This text and others were used to establish that police were trained to use deception and coercion to elicit confessions. See *id.*, at 448-455. *Miranda* condemned the police tactics that played upon the duress inherent in the situation and " 'deprived [the subject] of every psychological advantage.' " *Id.*, at 449 (quoting C. O'Hara, Fundamentals of Criminal Investigation 99 (1956)). This Court did not believe Fifth Amendment rights could be adequately protected if the subject was placed in the investigator's office where " 'the investigator possesses all the advantages.' " *Id.*, at 450. Police custody exacerbated

the issue because it "deprive[d] [the subject] of any outside support[,]" and "[t]he aura of confidence in his guilt undermines his will to resist." *Id.*, at 455. Thus, instead of getting a true confession, "[h]e merely confirms the preconceived story the police seek to have him describe." *Ibid. Miranda* warnings were conceived to prevent this result, and place "a proper limitation upon the custodial interrogation . . . " *Id.*, at 447.

To be sure, Shatzer was continuously confined. As the Maryland Court of Appeals noted, his "freedom of movement and action was restricted." *Shatzer* v. *State*, 405 Md. 585, 616, 954 A. 2d 1118, 1137 (2008). But *Miranda* warnings are not required for every detention that significantly restricts freedom of movement. For example, *Miranda* warnings are not required before the roadside questioning of a motorist. See *Berkemer* v. *McCarty*, 468 U. S. 420, 440 (1984). Although the motorist in *Berkemer* had been deprived of his freedom of movement, "the atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kind of interrogation at issue in *Miranda* itself [citation], and in the subsequent cases in which we have applied *Miranda*." *Id.*, at 438-439. Since the facts did not demonstrate that McCarty would be detained until he revealed incriminating information, there was no need to extend *Miranda* to this situation. *Id.*, at 437.

Miranda warnings are also not required for probation interviews, see *Minnesota* v. *Murphy*, 465 U. S. 420, 430 (1984), even though the probationer is "in custody" for federal habeas purposes. See *ibid.* (citing *Jones* v. *Cunningham*, 371 U. S. 236, 241-243 (1963)). While probationers are "in custody" in the sense that their freedom of movement may be significantly restrained, many of the psychological ploys that *Miranda* held would compel self-incrimination are not present in

this type of official interrogation. *Id.*, at 433. For example, the probationer has not been placed in an unfamiliar environment. The interview is typically in a place where he regularly meets with the official. *Ibid.* The circumstances also do not suggest that interrogation will continue until the individual submits to the will of his official interrogator. *Ibid.* Where these circumstances are not present, this Court has found extension of the *Miranda* precedent unnecessary. See *ibid.*

Shatzer's confinement bears more similarities to these cases than it does to the coercive environments in *Miranda* and its companion cases. His freedom of movement was restricted by his incarceration, but his interrogations had nothing to do with the duration of his incarceration. He knew he was speaking to a government agent, but the record does not support a presumption that he did not believe he could terminate the interview at any time. Most importantly, Detective Hoover obviously lacked the power to promise or credibly imply release in exchange for a confession. As a man already convicted for sexual abuse of a child and sentenced by a court, Shatzer had no reason to believe confessing to Detective Hoover for a second crime would allow him to leave the Roxbury Correctional Institution the next day or any time before he would otherwise be released.

As recent articles and empirical studies have shown, *Miranda's* rationale has more relevance when the interrogating officer has the power to release a suspect if the suspect cooperates. Conti, The Psychology of False Confessions, 2 J. Credibility Assessment & Witness Psych. 14 (1999), examined the reasons innocent people may confess and the psychological and social influences interrogators use to obtain confessions. Conti wrote that because *Miranda* sought to

prevent obtaining confessions through coercion, the judicial system needs to pay close attention to "inappropriate approaches of eliciting confessions" with special attention paid to the length of the interrogation process. *Id.*, at 30-31. Conti and other researchers have focused on why some individuals give false confessions. *Id.*, at 14. Although *Miranda* protects the guilty along with the innocent, protecting the innocent from false confessions is a primary concern deserving special consideration in the scope and enforcement of the rule. See *Withrow* v. *Williams*, 507 U. S. 680, 692-693 (1993). The research has shown that individuals give false confessions for a variety of reasons: a pathological need for fame, a morbid desire for notoriety, protection of a family member or friend, threats, promises, anxiety, fatigue, pressure, and confusion. Conti, *supra*, at 21-22. Some of these are within the interrogator's control, and some are not.

Interrogation methods that the criminal justice system can control include the abusive methods mentioned in *Miranda*, the most important of which is placing a suspect in an unfamiliar, private environment. *Id.*, at 28-29. In this situation, the suspect is arguably compelled to confess because his interrogating officer exercises some control over the length of his detention. The situation is markedly different when a prisoner is serving time for a sentence that is unrelated to his current offense. In this situation, it is far more likely that the suspect confessed because of the strength of the evidence against him, or because he felt guilty and needed to get the crime "off his chest." See J. F. Sigurdsson, G. H. Gudjonsson, E. Einarsson, G. Gudjonsson, Differences in Personality and Mental State Between Suspects and Witness Immediately After Being Interviewed by Police, 12 Psychol., Crime & L. 619, 622-623 (2006).

Mathis v. *United States*, 391 U. S. 1 (1968), addressed whether *Miranda*'s protections are warranted in a prison setting, but this Court has not yet ruled on whether *Edwards*' extension of *Miranda*'s protection is necessary in this situation. The question raised by the present case is whether to extend *Mathis* beyond *Miranda* and into *Edwards*. The dubious legal reasoning of *Mathis* suggests it should not be extended.

Mathis had been serving a state sentence in prison when he gave incriminating evidence to a government agent investigating him for tax fraud. *Id.*, at 2. The agent did not give Mathis his *Miranda* warnings. *Id.*, at 2-3. This Court suppressed the incriminating evidence, stating, "We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." *Id.*, at 4-5. The majority did not look very hard. Without analysis, the opinion relied solely on *Miranda*'s conclusion that *Miranda* warnings were required whenever the accused was in custody, with "custody" defined as " 'taken into custody or otherwise deprived of his freedom by the authorities in any significant way.' " *Id.*, at 5. Unlike *Berkemer*, *Mosley*, *Murphy*, and *Perkins*, there was no discussion of whether the primary concern behind the *Miranda* rule—that custody could be so inherently coercive as to compel the accused to make incriminating statements—was implicated in this situation. The *Mathis* Court held that preservation of the suspect's Fifth Amendment privilege required at least a *Miranda* warning, but we are left with no explanation as to why. *Id.*, at 4-5. Justice White's dissent, in contrast, does return to the underlying purpose of *Miranda*.

As he explained when he rejected the majority's "cavalier" conclusion that Mathis was "in custody" for *Miranda* purposes, Justice White correctly focused on

the "sense of the phrase" as it was used in *Miranda*. *Id.*, at 7.

> "But *Miranda* rested not on the mere fact of physical restriction but on a conclusion that the coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings. Neither the record nor the Court suggest reasons why petitioner was 'coerced' into answering [the revenue agent's] questions any more than is a citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews. The rationale of *Miranda* has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect." *Id.*, at 7-8 (White, J., dissenting).

Since *Mathis*, this Court has not had occasion to reconsider whether Justice White had the better argument. However, *Illinois* v. *Perkins*, 496 U. S. 292 (1990), did hint that *Mathis* may not require extension of *Miranda* to all forms of incarceration. In *Perkins*, a defendant was in jail awaiting trial for an aggravated battery, unrelated to the murder that an undercover agent was investigating. 496 U. S., at 294. The agent was placed in the jail, and, during incarceration, Perkins voluntarily made incriminating statements to the agent that ultimately led to Perkins being charged for murder. *Id.*, at 294-295. This Court reasoned that because " '[f]idelty to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated,' " *id.*, at 296 (quoting

Berkemer v. *McCarty*, 468 U. S. 420, 437 (1984)), there was no need to extend *Miranda* to "conversations between suspects and undercover agents [that] do not implicate the concerns underlying *Miranda*." *Ibid.* *Perkins* distinguished *Mathis* on this basis, but also noted parenthetically, "[t]he bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official . . . ." *Id.*, at 299. While this comment is dictum, it does indicate that the simplistic application of *Miranda* and all of its progeny to every type of custody is not a foregone conclusion.

The cases that have specifically addressed *Edwards'* scope as construed by *Miranda* have done so in cases where the accused was still in police custody, not correctional custody. *Arizona* v. *Roberson*, 486 U. S. 675 (1988), affirmed the *Edwards* rule in a case where " 'the accused was continuously in *police* custody from the time of asserting his Fifth Amendment right through the time of the impermissible questioning. The coercive environment never dissipated.' " *Id.*, at 680 (emphasis added) (quoting state court opinion). This Court held that interrogation for a separate offense while still in police custody was a "factual distinction" that did not "hold any legal significance for Fifth Amendment purposes." *Id.*, at 678 (quoting *State* v. *Routhier*, 137 Ariz. 90, 97, 669 P.2d 68, 75 (1983)).

> "Especially in a case such as this, in which a period of three days elapsed between the unsatisfied request for counsel and the interrogation about a second offense, there is a serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged *police* custody." *Id.*, at 686 (emphasis added).

In contrast, the factual distinction that the suspect is *not* in police custody should hold legal significance.

Minnick v. *Mississippi*, 498 U. S. 146 (1990), did not change the understanding that the right to counsel can be waived. *Minnick* addressed whether the *Edwards* prohibition ceased once a suspect, held pre-trial in police custody for four days, had the opportunity to consult with a lawyer. *Id.*, at 148-149. Minnick had been arrested on a Friday and was interviewed by two FBI agents on Saturday. *Id.*, at 148. The agents read him his *Miranda* warnings, and Minnick stated, "Come back Monday when I have a lawyer." *Ibid.* The agents ceased their interview. *Id.*, at 149. Minnick met with his appointed attorney over the weekend. *Ibid.* The following Monday, a Deputy Sheriff from Mississippi came to the San Diego jail to question Minnick. *Ibid.* Minnick claimed he was told he had to talk to the officer, but again he refused to sign a waiver form. *Ibid.* Minnick did answer questions and made incriminating statements. *Ibid.*

This Court's ruling in *Minnick* was a rejection of the Mississippi Supreme Court's ruling that *Edwards* applied up until the point that counsel had been made available to a suspect who asked for an attorney. *Id.*, at 151-152. Relying on the facts surrounding Minnick's interrogation, as well as *Edwards*' protection " 'from badgering a defendant into waiving his previously asserted *Miranda* rights[,]' " *id.*, at 150 (quoting *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990)), this Court found *Edwards* "to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning." *Id.*, at 153. The Court noted, "The case before us well illustrates the pressures, and abuses, that may be concomitants of custody." *Ibid.* Minnick claimed to have resisted both interrogations and did not sign a *Miranda* waiver in either interview.

Ibid. He was also interrogated for the same crime. *Id.*, at 148-149. Allowing his statements from the second interview at trial would have been inconsistent with *Miranda*'s finding that the opportunity to consult with an attorney could not sufficiently counteract the compulsion created by custodial interrogations. *Id.*, at 154 (citing *Miranda*, 384 U. S., at 470). A presumption was warranted because in this situation, there was reason to suspect that the pressures of police custody had a coercive effect. See *id.*, at 153-154. In light of the differences between pretrial police custody and postjudgment correctional custody, *Minnick* does not foreclose the conclusion that extension of *Edwards*' prophylactic rule to the latter type is unnecessary.

C. Correctional Custody is Different.

The facts surrounding Shatzer's second interrogation illustrate a case where extension of *Edwards* is not necessary. Shatzer had been given his *Miranda* warnings and had voluntarily waived his rights. *Shatzer*, 405 Md., at 590, 954 A. 2d, at 1121. Shatzer's second interrogation took place in correctional custody, and not the police custody this Court has found inherently coercive. As a sentenced convict, Shatzer had no reason to believe that Detective Hoover had control over the length of time he remained in custody. This reduces the need to presume Shatzer's waiver of his *Miranda* rights was obtained through coercive promises of early release or any threats to indefinitely detain. Shatzer is not like the suspects in confession studies who confessed just to go home. See Kassin, The Psychology of Confessions, 4 Annual Rev. L. Soc. Sci. 193, 195 (2008). He was not going home in any event, except to the extent prison is "home." *Miranda*, *Edwards*, and *Roberson* have all sought to preserve the privilege against self-incrimination in the face of the inherently compel-

ling pressures of police custody. Confinement in a correctional facility is something different.

As a conclusive presumption that excludes evidence, the *Edwards* rule should not be extended to a situation where its conclusion is often wrong. See Part II, *supra*. Although Shatzer's freedom of movement was restricted while in correctional custody, his custody is not the type of custody that *Miranda* found dangerous. *Edwards* should not be extended to this situation.

CONCLUSION

The decision of the Maryland Court of Appeals should be reversed.

April, 2009

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 08-680

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In the Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF FLORIDA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WISCONSIN AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?

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STATEMENT OF AMICI INTEREST

The amici states have a direct interest in this case because by making defendants forever immune from questioning, particularly in the prison setting, the Maryland Court of Appeals interpreted the prophylactic rule of *Edwards v. Arizona* in a way that prevents law enforcement from investigating new leads via consensual re-interrogation. This interpretation disserves the states' criminal justice interest in solving "cold cases." Such dormant cases are a significant source of frustration to the states' ability to reduce crime and bring criminals to justice. More importantly, these cases are a particularly significant source of frustration to the victims of such long-unsolved crimes.

The states' interest in fighting crime would be better served by allowing law enforcement to reopen investigations and re-interview potential suspects after there has been a break in custody, rather than automatically applying the *Edwards* rule for all time. After a break in custody, there will be little risk of the potential police coercion and badgering that troubled the Court in *Edwards* and subsequent decisions. At the same time, there is no countervailing reason for this Court to adopt the kind of categorical denial of any ability to effectively follow up on new leads by consensual questioning that results from the Maryland Court of Appeals decision.

SUMMARY OF ARGUMENT

This Court should clarify that in applying the prophylactic *Edwards* rule against police-initiated

re-interrogation after a suspect has invoked his right to counsel (a second-tier protection that flows from *Miranda*), a break in the initial custodial relationship or a substantial lapse of time vitiates the concerns addressed in *Edwards* that police may attempt to badger or coerce a suspect. Investigators and prosecutors would be better served by a more pragmatic rule than the per se *ad infinitum* rule the Maryland Court of Appeals adopted. A better approach focuses on a break in custody, reasoning that such a break obviates the need for the second-level protections of *Edwards*. As long as the break in custody cannot be shown to be a pretextual move by officers in that they have conducted their investigation in good faith, they should be able to re-initiate their investigation and potentially obtain a voluntary waiver from a previous suspect. This approach would have fewer negative societal impacts by not impairing law enforcement's efforts to solve stagnant investigations and bring "cold case" suspects to justice. Additionally, a break in custody vitiates the concerns of coercion and badgering that were the reasons behind *Edwards*'s second-level prophylactic protection.

The majority of federal and state courts have recognized a break in custody approach that obviates the need for the *Edwards* protection. Moreover, a suspect's ongoing incarceration and return to prison is not continuing *Miranda* custody under *Edwards*. There is no need to provide blanket *Edwards* protection indefinitely under these circumstances, and to do so gives little weight to the substantial state interests in solving dormant cases for the benefit of victims and the community. Police need to

be able to pursue new leads in dormant "cold case" investigations, which often include re-interviewing witnesses and suspects. Many suspects or witnesses are incarcerated on unrelated charges at the time of re-interrogation. No significant purpose is served by shielding a suspect from further voluntary questioning once the former investigation has stalled or closed and the suspect was previously released.

The amici states, in keeping with a majority of federal and state courts, urge this Court to adopt a rule that *Edwards* no longer applies when there has been a break in custody or substantial lapse in time, with no evidence of pretext or that any subsequent investigation has been conducted in bad faith. This approach better ensures that the prophylactic reasons behind *Miranda* and *Edwards* are being served, while at the same time giving weight to the significant state interests in effective law enforcement and criminal justice.

ARGUMENT

I. THE MARYLAND COURT'S DECISION IS AT ODDS WITH THE REASONING OF FEDERAL AND STATE COURTS THAT A BREAK IN CUSTODY MOLLIFIES THE CONCERNS AT ISSUE IN *EDWARDS* REGARDING SUBSEQUENT INTERROGATION.

Federal and state courts, including courts in Florida, have held that a break in custody (which includes at least some lapse in time) renders the application of the bright-line *Edwards* rule

inappropriate. As pointed out by Judge Harrell in dissent from the Maryland Court of Appeals majority, federal courts have admitted statements obtained in violation of *Miranda* when there has been a substantial passage of time and curative measures have been exercised. *See Shatzer v. State*, 954 A.2d 1118, 1138 (Md. Ct. App. 2008) (Harrell, J., dissenting). The majority erred in failing to apply the rationale of these cases, reasoning instead that the goals behind *Edwards* would be thwarted in the absence of applying its bright-line rule *ad infinitum*. *See id.* Instead, a break in time following a break in *Miranda* custody should be enough to vitiate the *Edwards* concerns regarding pressure and coercion. *Edwards* should therefore not apply in these situations.

A. Courts should apply a more pragmatic approach to situations where there has been a break in custody, in order to further the goals of *Edwards* while taking into account the states' substantial interests.

The Maryland court's holding goes well beyond the prophylactic rule articulated in *Edwards*, treating suspects as indefinitely unquestionable. This is true regardless of whether subsequent statements were made as a result of pressure and coercion, and regardless of whether the suspect remained "in custody" for *Miranda* purposes. Such a draconian, unending extension of *Edwards* fails to take into account the states' strong interest in bringing criminals to justice by investigating new

leads in order to solve dormant or "cold cases." The interests in criminal justice and victims' rights would be properly accounted for in adopting a break in custody approach rendering *Edwards* inapplicable.

No sufficient justification exists for the Maryland court's per se application of *Edwards* to bar questioning forever. Instead, a more pragmatic analysis should be conducted to ensure that the goals behind the *Edwards* second-level prophylaxis are being served, while also determining whether its second-tier protection is warranted after a passage of time. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (discussing goal of *Edwards* as ensuring that subsequent statements are "not the result of coercive pressures."). Where a break in custody occurs, the substantial public interest in criminal justice and victims' rights may be significant while the continuing application of *Edwards* is unnecessary.

Judge Harrell correctly noted that the Maryland court's opinion does nothing to further the "laudable goals" of *Edwards,* which were to prevent coercion and badgering by police, and to "conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness." *Shatzer,* 954 A.2d at 1146 (Harrell, J., dissenting). In cases such as Shatzer's, there is no evidence of coercion, no evidence of any "psychological disadvantage" as a result of questioning more than two years later, and no evidence that police badgered the suspect into answering questions, especially because later investigators were not aware that the suspect had previously asked for counsel. *See id.* To

create a per se rule in this kind of situation produces "absurd results" in that it creates "a class of prisoners who are forever question proof – even though law enforcement officers would have no way of knowing that the prisoner enjoys question-proof status." *Clark v. State*, 781 A.2d 913, 947-48 (Md. Ct. Spec. App. 2001). Instead, a break in custody should enable investigators to constitutionally attempt to solve "cold cases" via consensual re-interrogations.

Given the specific concerns behind the creation of the second-level prophylactic protection in *Edwards*, there is no need for courts to apply its additional *Miranda* safeguards *ad infinitum*. A break in custody combined with the absence of coercion or other improper tactics should serve to undercut the rationales of *Edwards* and eliminate the need for the broad approach of the Maryland court of appeals. This break in custody approach, which recognizes that the rationales behind *Edwards* may no longer be relevant under the circumstances, is analogous to the Court's application of *Miranda* to subsequent interrogations. *See Oregon v. Elstad*, 470 U.S. 298, 303, 308 (1985) (reasoning that proper *Miranda* warnings and a voluntary waiver of rights could "cure" any violation as a result of an earlier, unwarned but voluntary statement because "the twin rationales – trustworthiness and deterrence" would not be furthered by a broader rule); *compare Missouri v. Seibert*, 542 U.S. 600 (2004) (holding that "two-step" interrogation process, where officers violated *Miranda* by eliciting unwarned statements prior to re-interrogating and eliciting repeated statements after the warnings, necessitated suppression of all statements because the procedure

was meant to coerce the suspect and get around the *Miranda* requirements); *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (reasoning that *Miranda* must be applied strictly, "but only in those types of situations in which the concerns that powered the decision are implicated.").

A break in custody approach, rendering the rule of *Edwards* inapplicable, would still take account of the interests behind *Edwards* (ensuring voluntary statements by disapproving coercion and badgering) while at the same time recognizing the essential goals of law enforcement and public safety. In Shatzer's case, no evidence exists of coercion, badgering, or improper attempts to get around the requirements of *Miranda*, particularly given the break in custody and substantial passage of time. As such, law enforcement should have leeway under these circumstances to pursue new leads and solve stagnant investigations that may not otherwise be solved without re-interrogating past suspects or witnesses and obtaining voluntary statements.

To hold otherwise, as Judge Harrell emphasized, would have "troubling policy implications." *Shatzer*, 954 A.2d at 1152. It would create more difficult investigations where inmate questioning is involved, making resolution of long-unsolved crimes much more difficult and time-consuming for police, who will have to determine whether an inmate has ever invoked his right to counsel before proceeding to question him voluntarily about an unsolved crime. This law enforcement hardship is the result of the "boundless"

scope of the Maryland majority's holding in Shatzer's case. *See id.* at 1153.

The key inquiry in these cases should be the status of the suspect in between the two investigations. There is no need for the continued application of the bright-line *Edwards* rule against police-initiated interrogation when the suspect was released from custody for a period of time between two interrogations. The accused's status has changed so significantly that there is no longer any need for an irrebuttable prophylactic rule. The focus should instead be on the voluntariness of the suspect's statements for purposes of the Fifth Amendment and the appropriateness of police conduct. A break in time, combined with no evidence of badgering and coercion, should remove any *Edwards* barrier to admission of statements made as part of a subsequent investigation after proper *Miranda* warnings have been given. To hold otherwise is to stop the pursuit of potential new avenues of investigation in their tracks without serving any interest articulated in *Edwards*.

This is not a case revealing a police strategy to undermine the *Edwards* rule. Nor is it a case involving a brief lapse in time between questioning while the suspect is still in *Miranda* custody, which would indicate obvious coercion and confusion. *See Seibert*, 542 U.S. at 616-17 (asserting that "a reasonable person in the suspect's shoes would not have understood [the officers] to convey a message that she retained a choice about continuing to talk."). There is nothing that demonstrates a desire by the officers to get around the prohibition on re-

interrogation by releasing the suspect and letting a brief amount of time pass before initiating further questioning.

Here, the evidence demonstrates that the defendant was no longer in custodial interrogation flowing from the original investigation. The officer involved in the interrogation after two-and-a-half years was unaware of the previous invocation, and did not attempt to pressure the suspect in any way. The subsequent questioning in this case was conducted in good faith after a non-pretextual break in custody and a substantial passage of time. There is no justification for the continued application of the *Edwards* protection, which was meant to prevent police from making an end-run around the *Miranda* protections, thereby preventing a suspect from effectively invoking his right to counsel. *See id.* at 617 (Breyer, J., concurring).

The Maryland court's decision makes a prisoner forever unquestionable unless police conduct an exhaustive analysis of the prisoner's prior interrogations. This is true even though many suspects commit multiple crimes, become suspects for unrelated crimes while incarcerated, and are often questioned at various times by many different law enforcement agencies. This does not serve the interests set forth in *Edwards* and it disserves the public's interest in criminal justice. If there was ever a previous invocation, all statements would be excluded, even though officers may have no way of knowing whether there was a previous invocation, perhaps in a distant locale many years ago. Police may have to wait until a prisoner is released and

there is a clear break in prison custody, creating an even longer passage of time and exponentially reducing the possibility that a "cold case" will be solved. The Maryland court disregarded the public's interest in solving dormant cases when it created such a hard-line per se *Edwards* approach.[1]

Prophylactic rules are easy to understand and administer, but they should be no broader than necessary to accomplish their objectives. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 762 (2000) (Scalia, J., dissenting) (discussing restrictions on freedom of expression and reasoning that "[p]rophylaxis is the antithesis of narrow tailoring"); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (reasoning that prophylactic rules must be understood in light of the prophylactic purposes that justify them). Rote application of the *Edwards* rule in situations where there has been a break in custody would further no prophylactic interests while dealing an unnecessarily debilitating blow to law enforcement's ability to

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[1] *See, e.g.*, Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 11, 28 (2000) (stating that "one might also examine the nature of the evil sought to be avoided by Edwards – the badgering of a suspect who has expressed helplessness without the assistance of counsel during custodial interrogation – and ask whether its irrebuttable presumption and attendant cost is necessary, or even appropriate, in furthering that goal."). Professor Shapiro suggests that the bright-line *Edwards* presumption should be rebuttable, and depending on the circumstances of a particular case, re-interrogation should be permitted. He includes in these potential circumstances cases in which "the passage of a specific, particularly lengthy period of time might well have the bright line consequence of permitting reinterrogation." *Id.* at 33.

crack unsolved crimes. As Justice Kennedy noted in *Seibert*, evidence should be admissible in *Miranda* suppression cases when the "central concerns" of the prophylactic rule are "not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert*, 542 U.S. at 618-19 (Kennedy, J., concurring). Similarly, when there is no pressure or coercion, the continued application of the bright-line *Edwards* rule against police-initiated questioning is not necessary, and the circumstances dictate against per se suppression of statements obtained after re-interrogation. *See id.* at 620-21 (discussing per se suppression due to a previous *Miranda* violation and reasoning that such an approach does not serve the deterrence goals of *Miranda* and fails to take account of the interest in admitting trustworthy evidence).

Edwards was meant to give proper effect to the *Miranda* warnings, which include invocation of the right to counsel. There is simply no need to extend *Edwards* for all time without regard to the circumstances of re-opened cases. The important analysis in determining whether *Edwards* should apply is to determine whether its second-level prophylactic goals are being thwarted such that the suspect's statements were made against his will and without proper recognition of his previous invocation of the right to counsel. This may not be the case when there has been a "substantial break in time and circumstances." *Id.* at 622.

In this case, the suspect was previously released from custody, a substantial break in time occurred, and he voluntarily waived his rights. The

officer conducting the re-interrogation had nothing to do with the previous investigation and was not aware of any previous invocation. There was no reason Shatzer would feel "badgered" or coerced by the police under these circumstances, or that officers did not intend to honor his previously stated desire to have counsel present. *Cf. Minnesota v. Murphy*, 465 U.S. 420, 433 (1984) (reasoning that "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained."). The Maryland court's application of *Edwards* and creation of a per se *ad infinitum* rule was therefore unwarranted.

B. Courts have overwhelmingly held that *Edwards* does not apply when there has been a break in custody, which can include a return to the inmate population.

Contrary to the Maryland court's reasoning, the majority of courts applying *Edwards* have not adopted an *ad infinitum* approach to applying its second-level protection. Federal courts and courts in many states have held that a break in custody, which can include a return to the inmate population after interrogation, disengages the prophylactic *Edwards* rule against police-initiated re-interrogation. Courts have adopted this approach in line with the Court's statement in *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991), that "[i]f police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's

statements are presumed involuntary." (emphasis added).

While *Edwards* creates a bright-line rule, courts have not applied this rule in cases where the suspect has been released from coercive interrogation and a lapse of time has occurred. In such cases, whenever the suspect has been removed from the coercive environment, he has not remained in continuous custody in order to justify the additional layer of prophylaxis above and beyond the *Miranda* protections. *See Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (discussing *Edwards* as a "corollary" to *Miranda*). A return to daily prison life after interrogation does not constitute continuing custody such that subsequent interrogation is forever barred in the absence of adherence to *Edwards*. Judge Harrell correctly reasoned that "custody" in this case means the same thing as it would under *Miranda*, and returning to daily life, whether in the general or prison population, cannot constitute a continuation of custody for the purpose of interrogation. *See Shatzer*, 954 A.2d at 1147-49 (Harrell, J., dissenting). This reasoning correctly gives effect to the general goal behind *Edwards*: to give further protection from coercion that would render *Miranda* ineffective.

In *United States v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990), for example, the Sixth Circuit Court of Appeals reasoned that a prisoner interrogated after being incarcerated was not "in custody" prior to the actual interrogation. The court explained that because the inmate was already serving a prior sentence, he "was no stranger to the penitentiary"

and could not be in custody for purposes of the *Edwards* protection. *Id.* Statements given by the defendant three months after invocation of the right to counsel were accordingly not barred by *Edwards* simply because the defendant was incarcerated prior to re-interrogation. *See id.* at 962-63. More recently, the Eleventh Circuit Court of Appeals reasoned that being a part of the general prison population is "the accustomed milieu" for inmates, and is not the kind of potentially coercive situation that would constitute continued *Miranda* custody. *See Isaacs v. Head*, 300 F.3d 1232, 1267 (11th Cir. 2002).

The defendant, while technically in government prison custody, is not "in custody" in the sense that he would be subject to the "coercive pressures" that are the concern of the prophylactic protections of *Miranda* and *Edwards*. *See id.* at 1266. Incarceration following conviction, as in Shatzer's case, therefore constitutes a break in custody. *See also United States v. Arrington*, 215 F.3d 855, 856 (8th Cir. 2000) (holding that conviction and sentencing was an intervening event, and transfer from "police custody to correctional custody" meant that the suspect was no longer "in custody" under *Edwards*); *United States v. Conley*, 779 F.2d 970, 972-73 (4th Cir. 1985) (reasoning that a prison inmate is not automatically "in custody," otherwise *Miranda* would be stretched to the "illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart") (citation omitted) *Cervantes v. Walker*, 589 F.2d 424, 428 (9th Cir. 1978) (reasoning that "in custody" in the prison setting "implies a change of surroundings of the prisoner which results in an added imposition on his

freedom of movement," and as such the court should "look to some act which places further limitations on the prisoner.").

If the "inherent coercion" from police presence is absent from the circumstances, which can include regular prison life, then the prophylactic *Miranda* and *Edwards* rules need not apply. *See Illinois v. Perkins*, 496 U.S. 292 (1990). This is true because there is "little cause for concern that a police officer will 'appear to control the suspect's fate' . . ., at least in the absence of a showing that the officer's conduct somehow creates an atmosphere of custody going beyond that to which the suspect is accustomed in his normal setting." *Kochutin v. State*, 813 P.2d 298, 309 (Alaska Ct. App. 1991) (Bryner, J., dissenting) (citing federal cases). Once an incarcerated suspect returns to the "ordinary routine" of prison life, he should be treated in the same manner as if there had been a break in custody due to his release. *See id.* at 309-10.

Shatzer's re-interrogation did not occur until two-and-a-half years had passed, long after any coercive pressures or potential badgering could have been at issue. It makes no sense, as courts have recognized, to extend the blanket protections of *Edwards* indefinitely to situations such as Shatzer's, creating presumptively question-proof inmates even though investigators re-open important investigations into serious crimes and essentially start from scratch, with no suspects currently in custody. *See, e.g., Hall*, 905 F.2d at 963. There is no reason to give inmates *more* protection under *Edwards* than most courts, following this Court's

statement in *McNeil*, would give a suspect released into the community prior to re-interrogation.

A large number of states have also recognized the countervailing interests at play when a suspect is re-questioned after his release and the passage of time. Courts in Florida and across the country have held that a break in custody vitiates the *Edwards* rule. In *Keys v. State*, 606 So. 2d 669, 671 (Fla. Dist. Ct. App. 1992), for example, the Florida First District Court of Appeal adhered to the Eleventh Circuit's decision in *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), reasoning that a break in custody after the invocation of Fifth Amendment rights "ends the need for the *Edwards* rule." *Id.* A suspect may validly waive his *Miranda* rights after a break in custody, as there would be no evidence of coercion due to "prolonged police custody." *Id.* (citing *Arizona v. Roberson*, 486 U.S. 675, 686 (1988)). In Keys's case, there was a clear break in custody between a previous interrogation in a juvenile case and the subsequent interrogation as part of a murder investigation. *See id.* at 672; *see also Perrine v. State*, 919 So. 2d 520, 524-25 (Fla. Dist. Ct. App. 2005) (reasoning that the defendant's leaving the police station for 30 minutes to meet with a bail bondsman, followed by a return to the station and subsequent waiver of *Miranda* rights, "obviated" the effect of a previous improper police interrogation).

The Supreme Court of California adopted a break in custody approach to *Edwards*'s prophylactic rule in *People v. Storm*, 52 P.2d 52 (Cal. 2002). In *Storm*, the defendant left police custody and was re-interrogated two days later at his home after

previously invoking his *Miranda* rights. *See id.* at 54. The California court reasoned that in this situation, the "special protections" of *Miranda* and *Edwards* should not apply because there was no evidence of coercion that comes from police custody. *Id.* at 55. The *Edwards* rule only "guards against police badgering designed to wear down a suspect who *remains in custody* after invoking his *Miranda* right to counsel during custodial questioning." *Id.* Because there was no evidence of coercion or involuntary statements after a break in custody and a lapse in time (of two days) had occurred, the *Edwards* rule did not apply. *See id.* at 55, 62-63; *see also People v. Bonnie H.*, 65 Cal. Rptr. 2d 513, 514 (Cal. Ct. App. 1997) (reasoning that on issue of first impression, there is no policy reason why a "good-faith break in custody" should not dissolve the *Edwards* bar to admission of statements later obtained after valid *Miranda* waiver).

When the suspect has been released, he is simply "no longer under the 'inherently compelling pressures' of continuous custody where there is a reasonable possibility of wearing the suspect down by badgering police tactics to the point the suspect would waive the previously invoked right to counsel." *Bonnie H.*, 65 Cal. Rptr. 2d at 526. This break in custody approach permits law enforcement to follow up on investigations into the most serious crimes via voluntary re-interrogation.[2]

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[2] Courts in numerous other states have adopted the approach that a break in custody eliminates the concerns in *Edwards* that police may coerce or badger an in-custody suspect, and (Continued...)

therefore *Edwards* no longer applies. *See, e.g.*, Pet. at 16 (listing states); *Kochutin v. State*, 875 P.2d 778, 779 (Alaska Ct. App. 1994) (discussing the "universally recognized" rule that a break in custody renders *Edwards* inapplicable); *People v. Trujillo*, 773 P.2d 1086, 1092 (Colo. 1989) (holding that *Edwards* does not apply when there has been a break in custody); *United States v. Green*, 592 A.2d 985 (D.C. Ct. App. 1991) (discussing reduced danger of coercion and badgering when interrogation had not occurred for several months); *Wilson v. State*, 444 S.E.2d 306, 309 (Ga. 1994) (reasoning that "[b]ecause of the absence or dissipation of coercion once a suspect is released from custody," *Edwards* did not compel suppression); *State v. Alley*, 841 A.2d 803, 809-10 (Me. 2004) (admitting statements made after six-hour break in custody); *Commonwealth v. Galford*, 597 N.E.2d 410, 413-14 (Mass. 1992) (adopting break in custody approach); *People v. Harris*, 680 N.W.2d 17, 23 (Mich. Ct. App. 2004) (holding that *Edwards* rule did not apply to interrogation that occurred 11 days after the initial questioning after a break in custody because "the concern of *Edwards* – coercive questioning by the government that deprives a suspect of the benefits" of counsel – is not implicated); *State v. Scanlon*, 719 N.W.2d 674, 682 (Minn. 2006) (holding that a lapse in time of several months during which the defendant was not in custody limited the applicability of *Edwards*); *Willie v. State*, 585 So. 2d 660, 666-67 (Miss. 1991) (stating that break in custody obviates *Edwards*); *State v. Harrison*, 213 S.W.3d 58, 72 (Mo. Ct. App. 2007) (affirming denial of motion to suppress statements made following a break in custody of several days because the suspect was "no longer subject to the inherently compelling pressures of custodial interrogation"); *State v. Warren*, 499 S.E.2d 431, 440-41 (N.C. 1998) (reasoning that *Edwards* does not apply when there has been a break in custody); *State v. Neely*, 829 N.E.2d 718, 724-25 (Ohio Ct. App. 2005) (reasoning that a break in custody for a reasonable period of time vitiates the rule in *Edwards* and noting that "other courts have unanimously reached this conclusion"); *Commonwealth v. Wyatt*, 688 A.2d 710, 712-13 (Pa. 1997) (reasoning that break in custody makes *Edwards* inapplicable); *Commonwealth v. Gregory*, 557 S.E.2d 715, 722-23 (Va. 2002) (stating that the "underlying concern of *Miranda*,

(Continued...)

The Maryland Court of Special Appeals previously adopted the approach that a break in custody vitiates the *Edwards* second-level protection as a matter of first impression, well before the decision at issue. *See Clark v. State*, 781 A.2d 913 (Md. Ct. Spec. App. 2001). The court emphasized that this is true even if the defendant pleads guilty and is incarcerated prior to re-interrogation. *See id.* at 929-30. Because the defendant does not necessarily enter the coercive and restrictive environment that brings *Miranda* and *Edwards* into play, even if he normally resides in prison, the second-tier protection may not apply. *See id.*; *see also id.* at 942 (citing federal and state courts that have "unanimously" interpreted the Supreme Court's decision in *McNeil v. Wisconsin* as rendering *Edwards* inapplicable when there has been a break in custody).

Even when released to the general prison population, an inmate is placed "in a very different atmosphere than the one he endured after arrest . . . worried and uncertain about his fate with regard to the pending charges." *Id.* at 946. "Common sense dictates" that the extra prophylactic protections are not needed when the *Edwards* rationales no longer

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Edwards, and their progeny is the coercive atmosphere of custodial interrogation and the state of mind of the suspect," and reasoning that protections should not apply when there is a break in custody, otherwise the *Edwards* prohibition "illogically extends into perpetuity"); *State v. McKenzie*, 475 S.E.2d 521, 530 (W. Va. 1996) (stating that break in custody obviates *Edwards*).

apply under the circumstances. *Id.* at 947.[3] In short, once there is a break in custody and a "period of liberty" in that police are no longer questioning the suspect, those factors "mitigate strongly" against the *Edwards* presumption that a suspect is incapable of voluntarily waiving his *Miranda* rights. *Kochutin*, 875 P.2d at 780. Coercion should not be presumed, and there is no reason to believe that the suspect cannot voluntarily waive his rights under *Miranda*.

The bottom line is that *Edwards* should not be a bright-line rule that becomes a "laser, burning inexorably through form and substance into infinity." *Kochutin*, 813 P.2d at 310 (Bryner, J., dissenting). *Edwards* is prophylactic, not constitutionally required, and its application in cases like Shatzer's results in the suppression of uncoerced confessions to serious crimes, while furthering none of its purported goals. There is "no good basis for extending [*Edwards*] to insulate some suspects from questioning for years or even their entire life based

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[3] Commentators acknowledge the large number of federal and state courts that have adopted the presumption that *Edwards* does not apply when there has been a break in custody. *See, e.g.*, Shapiro, *supra* note 1, at 23. The concerns about coercion and police badgering are not present in such cases. *See* Marcy Strauss, *Reinterrogation*, 22 Hastings L.Q. 359, 396-97 (1995) (contending that the concerns in *Edwards* about compulsion to speak are "significantly lessened" when police have not questioned the suspect for "a substantial period of time"); Elizabeth Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards*, 20 New Eng. J. on Crim. & Civ. Confinement 539, 569 (1994); *see also* Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 932 (1997).

on a single request, long ago, for counsel." *Clark*, 781 A.2d at 946. If the policies behind *Edwards* no longer apply under the circumstances of a given case, then its bright line should "cease to shine." *See Kochutin*, 813 P.2d at 310.

The amici states urge this Court to explicitly make clear that the additional Fifth Amendment protections of *Edwards* are no longer necessary in cases where the suspect has been released from custody for purposes of *Miranda* and he is no longer in the potentially coercive environment of interrogation. Once a break in custody occurs and there is no police misconduct, there is no reason to believe that the suspect cannot make a knowing, intelligent and voluntary waiver of his *Miranda* rights.

II. THE MARYLAND COURT'S DECISION NEGATIVELY IMPACTS THE STATES' INTEREST IN FIGHTING CRIME AND SOLVING "COLD CASES."

This Court has recognized that "the need for police questioning as a tool for effective enforcement of criminal laws cannot be doubted," and that "[a]dmissions of guilt are more than merely 'desirable'...; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Excluding reliable, fairly obtained and voluntary confessions therefore exacts high costs from society. Confessions not only resolve "cold cases," they also ensure confidence in criminal judgments, reduce the risk

that innocent people will be convicted, and alleviate heavy burdens on the criminal justice system and victims of crime. A rule that *permanently* applies *Edwards* to police-initiated re-interrogations exacts all of these high costs.

The reality of law enforcement, as seen in both practice and in dramatic depictions on television and in the movies, is that police often investigate new and crucial leads after a substantial period of time in an attempt to resolve dormant cases that can have a devastating impact on victims and the community. These new leads often result in the need to re-interrogate past suspects regarding historical events that occurred long ago, some of which may have been the focus of prior interrogations that resulted in the invocation of the right to counsel followed by release from custody.

A good example of a heinous and excruciating "cold case" that was solved by subsequent leads and re-interrogation can be found in the facts of *Kochutin v. State*, 813 P.2d 298 (Alaska Ct. App. 1991). In that case, a seven-year-old boy was sexually abused and brutally murdered by a defendant who later became a prison inmate on unrelated offenses. *See id.* at 300. The defendant inmate contacted his attorney on the previous charges for which he was incarcerated, and informed police that he did not wish to be interviewed in relation to the homicide. *See id.*

A week later, police arrested another suspect in relation to the child's sexual abuse, but made no further contact with the inmate for the remainder of the year. *See id.* at 301. The case remained

unresolved for nearly a year, when officers then interviewed the incarcerated suspect without his previous attorney present. *See id.* Kochutin ultimately confessed to the sexual abuse and murder during subsequent interviews. *See id.* at 302.

The Court of Appeals of Alaska initially held that the subsequent interviews violated *Edwards*. It then vacated its first opinion, reasoning that the one-year break in custody "mitigated strongly against the presumption" that the suspect could not voluntarily waive his *Miranda* rights. *See id.* at 308; *Kochutin v. State*, 875 P.2d 778, 780 (Alaska Ct. App. 1994). The application of the "break in custody" rule to a crucial follow-up investigation of a "cold case" led to the conviction of an admitted child sex abuser and murderer.

Although not specifically a case involving the application of *Edwards*, another example of a particularly horrific "cold case" solved by the tireless and persistent efforts of law enforcement is discussed in *Texas v. Cobb*, 532 U.S. 162 (2001). There, nearly two years after a burglary and more than a year after appointment of counsel, the burglary suspect was questioned about the disappearance of a woman and her 16-month-old daughter. *See id.* at 165. He was given *Miranda* warnings and ultimately confessed to stabbing the woman to death and burying her with her child, who was still alive. *See id.* at 166. This Court ultimately ruled that the subsequent confession without counsel present did not violate the Sixth Amendment. The facts also demonstrate the persistence of police in pursuing leads and conducting good faith interrogations in an

effort to solve stagnating investigations. *See id.* at 176.

From actual news stories to reality and dramatic depictions such as the CBS television program "Cold Case,"[4] media outlets are also rife with examples of law enforcement pursuing new leads, including re-interrogations, in an effort to resolve stagnant investigations. It has been estimated that approximately 6,000 murders go unsolved each year in the United States, with at least 200,000 "cold cases" existing since 1960.[5] Approximately one-third of all murders are not solved within the first year of their commission.[6]

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[4] *See* http://www.cbs.com/primetime/cold_case/, for a synopsis of this popular and long-running television program. The show's web page synopsis states that the detective involved "interrogat[es] witnesses whose lives and circumstances have since changed, making use of today's new science and finding fresh clues to solve cases that were previously unsolvable..." *See id.* The popular on-line encyclopedia "Wikipedia" also has a page dedicated to Cold Cases, defined as unsolved cases "for which new information could emerge from new witness testimony or re-examined archives." *See "Cold Case,"* available at http://en.wikipedia.org/wiki/Cold_case (last visited March 17, 2009). There is also a "Wikipedia" page listing unsolved murders and deaths from 1800 through the present day. *See "List of unsolved murders and deaths,"* available at http://en.wikipedia.org/wiki/List_of_unsolved_murders_and_deaths (last visited Mar. 17, 2009).

[5] *See, e.g., The Cold Case Cowboys,* Dateline NBC, Jan. 29, 2006, transcript available at http://www.msnbc.msn.com/id/11093484.

[6] *See Resurrecting Cold Case Serial Homicide Investigations,* FBI Law Enforcement Bulletin, available at
(Continued...)

Solving this vast number of cases often takes both innovative and traditional efforts by law enforcement agencies, including follow-up interviews with past witnesses and suspects. "Cold case" investigative teams must find new techniques to uncover lost leads, and much of their information must come from interviews with formerly interrogated suspects.[7]

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http://www.fbi.gov/publications/leb/2005/august2005/august05leb.htm (Aug. 2005). The article describes the action of a cold-case investigative team, with the help of the FBI's National Center for the Analysis of Violent Crime, that linked three homicides to a suspect after re-opening the cases 20 years after the first murder and immediately interviewing him. *See id.* The FBI recommended re-interrogation as the first order of business and the team ultimately obtained a confession. *See id; see also* Beth Schuster, *Cold Cases: Strategies Explored at NIJ Regional Trainings,* NIJ Journal 260 (2008), available at www.dna.gov/training (discussing availability of witnesses and suspects as primary reasons to reopen cold cases).

[7] *See The Cold Case Cowboys, supra* note 6. "The Cold Case Cowboys" were a team of volunteers, including former law enforcement officers, hired by the sheriff's department in an Oregon town in an effort to put to rest its stack of unsolved murders. Among the volunteer team's success stories was an eight-year-old "cold case" murder that was solved through interviews with a former suspect, who was serving time in an Oregon prison. *See id.; see also* Jana Bommersbach, *Cold Case Unit,* Phoenix Magazine, April 2006, available at http://www.janabommersbach.com/pm-fea-apr06-2.php (profiling the Cold Case Unit of the Phoenix Police Department and its tireless efforts to solve decades-old stagnant cases through the use of new technology and re-interviewing witnesses and suspects); *Who Murdered the Rock Star?,* 48 Hours, Jan. 8, 2005, available at http://www.cbsnews.com/stories/2004/05/14/48hours/main617479.shtml (profiling the 1993 "cold case" murder of musician Mia Zapata in Seattle and (Continued...)

A recent example involved the reopened investigation into a 2000 abduction and murder of a 16-year-old lifeguard in Massachusetts.[8] In that case, which involved hundreds of tips and the largest manhunt in Massachusetts history, police acted on a tip to interview a potential suspect located in a Florida jail who had pled guilty to separate murder charges.[9] Without a "break in custody/lapse in time" approach rendering the prophylactic *Edwards* rule inapplicable, long-stagnating investigations into brutal murders such as the one in Massachusetts would be significantly thwarted by the risk that all

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the Cold Case Squad's efforts to solve the city's 300 stagnant cases).

[8] *See Justice for Molly: Is Killer Already in Jail?*, available at http://abcnews.go.com/print?id=6797785 (Feb. 4, 2009).

[9] *See id.* There are many more examples of "cold cases" where police have seemingly little faith of ever solving the crime, other than hoping that previous suspects or jail inmates will come forward with new leads concerning the long-stagnant investigation. *See, e.g., 20 Years Later, Family Still Searching for Tiffany Sessions*, available at http://www2.tbo.com /content/2009/feb/09/091828 (Feb. 10, 2009) (discussing February 9, 1989 disappearance of a University of Florida student and other "cold cases," including police methods of sending information to prison inmates in the hopes of obtaining new leads on old cases); *HCSO Turning Up Heat on Cold Cases*, available at http://www.newssun.com (Feb. 10, 2009) (discussing 22 cases in a Florida sheriff's office cold case unit and the methods used to solve them, including talking to people who have had a "change of heart" over a period of time and become willing to talk to police). The Cold Case Center also provides information on new cold cases and all federal and state agencies charged with attempting to solve such long-stagnant cases. *See* http://www.coldcasecenter.com/cold_cases.htm.

subsequent interrogations, although conducted in good faith, could later be suppressed in court.[10]

In Florida, at least 24 city and county law enforcement agencies have their own websites dedicated to investigating and solving cold cases.[11] As of March 2009, the Florida Department of Law Enforcement lists 61 state homicides as unsolved.[12] Moreover, Florida has an on-line database set up to receive information regarding unidentified decedents, which lists seven cases in which new information resulted in the identification of deceased persons, many of whom were crime victims.[13] This information and the use of new technology not only

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[10] Most recently, a Salvadoran immigrant located in a California prison on assault convictions was identified as the suspect in the unsolved 2001 slaying of Washington, DC intern Chandra Levy. *See, e.g., Affidavit: Chandra Levy Suspect Kept Her Photo in His Cell*, available at http://www.cnn.com/2009/CRIME/03/04/chandra.levy.suspect.guandique (Mar. 11, 2009). Police issued the arrest warrant eight years later after following up with several witnesses as part of their investigation into "one of Washington's most notorious cold cases." *See id.*

[11] *See* http://www.coldcasecenter.com/cold_cases.htm (last visited Mar. 20, 2009).

[12] *See* Florida Dept. of Law Enforcement, http://www.fdle.state.fl.us (last visited Mar. 20, 2009). The FDLE's website also describes "Cold Case Playing Cards" it has been using since July 2007. The cards, featuring the faces of victims and information on unsolved crimes, were distributed to inmates in the state's prisons and have thus far led to the resolution of two unsolved homicides. *See id.*

[13] *See* http://www.fluiddb.com (last visited Mar. 20, 2009).

demonstrates the large number of unsolved cases and missing persons, but it also shows that law enforcement agencies need to be flexible and use creative ways to solve frustrating and long-stagnant investigations. A "break in custody" approach removing the second-tier prophylactic barrier of *Edwards* would help ensure that police are not thwarted in their wide-ranging efforts to bring justice to victims and the community.

Certainly, in analyzing whether a break in custody has removed the protection of *Edwards*, courts should not allow officers to conspire to avoid the requirements of *Miranda*. Officers cannot pressure and coerce a suspect who has previously indicated his desire to communicate only through counsel. Officers should, however, be able to resume investigations into "cold cases" after a period of time without needless barriers. Officers acting in bad faith or attempting to avoid the prophylactic requirements of *Miranda* and *Edwards* would not have the benefit of statements obtained involuntarily.

At the same time, there is no reason to exclude statements made by a suspect after a break in custody, so that a subsequent waiver of rights can be considered a rational and voluntary choice. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985); *see also* Shapiro, *supra* note 2, at 12-13 (discussing the possibility of treating the *Edwards* presumption against questioning as a rebuttable one depending on the circumstances). This approach properly takes the substantial public interest in solving dormant cases

into account, for the benefit of victims and the community at large.

While the ultimate goal of *Edwards* is laudable – to protect against potential end-runs around the prophylactic *Miranda* protections – there is no reason why that goal cannot be furthered while still respecting the need to solve serious and heinous crimes. In cases such as this one, where there is no reason to believe that investigators were trying to avoid *Miranda*, applying *Edwards* in a draconian and essentially never-ending way simply makes no sense. Of course, in any case police still must adhere to the requirements of *Miranda*, ensuring that the suspect's choice to speak to police is made freely and voluntarily. The amici states urge this Court to clarify that *Edwards* has its limits and should be applied pragmatically and logically under the circumstances of each case.

CONCLUSION

For all of the above reasons, this Court should reverse the Court of Appeals of Maryland and rule that *Edwards* is inapplicable when there has been a break in custody such that a suspect can voluntarily waive his rights under *Miranda*.

Respectfully submitted,

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Supreme Court of the United States

STATE OF MARYLAND,
PETITIONER,
v.
MICHAEL BLAINE SHATZER, SR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether this Court should create exceptions to the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), let alone exceptions that would permit police from the same jurisdiction to reinterrogate a continuously imprisoned suspect about the very same offense as to which he had originally invoked his right to counsel.

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INTEREST OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately thirty-five *amicus curiae* briefs each year in this Court and other courts. NACDL previously has filed *amicus curiae* briefs in this Court in cases, like the present one, involving *Miranda v. Arizona* and the Fifth Amendment right against compelled self-incrimination. *See Maryland v. Blake*, 546 U.S. 72 (2005); *Missouri v. Seibert*, 542 U.S. 600 (2004); *Dickerson v. United States*, 530 U.S. 428 (2000).

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* the NACDL, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief from petitioner and respondent have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This Court should reaffirm the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), and hold that when a suspect invokes his Fifth Amendment right to counsel, the police may not reinitiate interrogation without making counsel available to the suspect, regardless of any alleged break in custody or lapse in time since the invocation of this right. At an absolute minimum, this Court should not permit police to reinitiate interrogation of a suspect concerning the very same offense as to which he invoked the right to counsel, especially where the suspect is incarcerated.

1. In *Edwards*, the Court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484–85. Thus, a suspect who has invoked his Fifth Amendment right to counsel in response to custodial interrogation is irrebuttably presumed unable to waive that right *unless* (1) counsel is present or (2) the suspect reinitiates communication with police. This rule serves to protect the right against self-incrimination by enforcing a suspect's choice to talk with police only through an attorney. The rule is also necessary in order to provide judges, law enforcement, and citizens clear guidance respecting the boundaries of the Fifth Amendment right to counsel.

2. The State urges this Court to create exceptions to the *Edwards* presumption following a substantial passage of time, a break in custody, or both. Each of

these proposed exceptions contravenes *Edwards*'s dual purposes.

a. The State's proposed "substantial period of time" exception to *Edwards* rests upon the erroneous assumption that a suspect's beliefs about the coercive pressures of custodial interrogation are altered with the passage of time. However, the mere passage of time presents nothing from which to "deduce that [a suspect's] original belief in his vulnerability to the pressures of custodial interrogation [has] diminished." *United States v. Green*, 592 A.2d 985, 989 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993). Furthermore, no principled basis exists for determining how much time must pass before *Edwards* would expire. Without a specific expiration period, a "substantial passage of time" exception would be arbitrary and would significantly erode *Edwards*'s bright-line rule.

b. A break-in-custody exception would also fatally undermine the *Edwards* rule. *Edwards* protects a suspect who has indicated he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist ...." *Arizona v. Roberson*, 486 U.S. 675, 684 (1988). A break in custody between interrogations does not change the pressures of custodial interrogation that initially gave rise to a suspect's belief that he is unable to bear police questioning without counsel. Moreover, a break-in-custody exception would serve only to increase these pressures by incentivizing police to badger suspects through repetitive catch-and-release tactics.

c. A combined substantial passage-of-time and break-in-custody exception would also defeat *Edwards*'s objectives. Courts applying a combined exception reason that *Edwards* should no longer apply following a break in custody when a suspect has sufficient time to contact a lawyer. This Court's decision in *Minnick v. Mississippi*, 498 U.S. 146, 153–54 (1990), discredits that reasoning. Furthermore, a combined exception would not reduce incentives for police to badger suspects.

3. Even if this Court were inclined to consider a break-in-custody exception to *Edwards*, the Court should not create such an exception in this case because, as a prison inmate, Shatzer remained in continuous custody since invoking his Fifth Amendment right to counsel. A person is in custody for *Miranda* purposes if a reasonable person would understand he was under "formal arrest" or restrained in his "freedom of movement [to] the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks and citation omitted). Because *Edwards* is a corollary of the *Miranda* rule, this "reasonable person" standard for custody controls *Edwards* cases.

A reasonable person would understand incarceration within the general prison population as a restraint on his freedom of movement at least equal to that of formal arrest. A person who is not just temporarily arrested, but who is imprisoned for a set term under government control is, *a fortiori*, in custody. The realities of prison life support this conclusion: prison exerts pressure on inmates by physically confining them, reducing their expectations of privacy, placing them under constant surveillance,

and pressuring them into cooperating with authorities to be eligible for parole. Unlike a person not in custody, a prisoner cannot "shut his door or walk away to avoid police badgering." *Montejo v. Louisiana*, 77 U.S.L.W. 4423, 4428 (U.S. May 26, 2009) (No. 07-1529).

4. At the very least, the Court should affirm because here, police within the same jurisdiction resumed interrogating Shatzer regarding the very offenses under investigation when he originally invoked the right, yet failed to provide him counsel. Protection against coerced waiver of the right to counsel in these circumstances is at the very core of *Edwards*. Once a suspect has invoked the right to counsel in a particular investigation, a court should presume at a minimum that a suspect desires assistance from counsel as to (1) all interrogation prior to a break in custody and (2) any further government-initiated interrogation regarding that offense. This presumption is essential to ensure that the government does not coerce a suspect into waiving his right to counsel after he already invoked that right as to the same offense, especially where the suspect is imprisoned.

ARGUMENT

I. THE *EDWARDS* BRIGHT-LINE RULE PROHIBITS *ANY* CUSTODIAL REINTERROGATION OF A SUSPECT UNTIL COUNSEL IS PRESENT OR THE SUSPECT INITIATES FURTHER COMMUNICATION

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court established a clear and effective rule to protect a suspect who invokes his Fifth Amendment right to

counsel against the coercive pressures of custodial interrogation. A suspect's assertion of the right to counsel is a "significant event." *Id.* at 485. Accordingly, the Court held that a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484–85. In other words, police may reinterrogate a suspect who has invoked the right to counsel and who is in custody only (1) when counsel is present or (2) when the suspect himself initiates further discussion. The Court emphasized that "it is inconsistent with *Miranda* ... for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485. *Edwards* thus "established a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). This "bright-line, prophylactic *Edwards* rule" has been in place for nearly thirty years. *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

Edwards serves both substantive and administrative purposes. Substantively, *Edwards* protects the right against self-incrimination by preventing police from badgering a suspect into "'waiving his previously asserted *Miranda* rights.'" *Davis v. United States*, 512 U.S. 452, 458 (1994) (citation omitted); *see also Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) ("The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures."). In particular, *Edwards* protects the right against self-incrimination by

enforcing a suspect's choice to talk with police only through an attorney. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny ...." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988); *see also Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (*Edwards* "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence").

Edwards's protection thus ensures that a vulnerable suspect will be able to take advantage of the many benefits of having counsel present during custodial interrogation. First, counsel can modulate an officer's potentially overbearing conduct. *See, e.g.*, *Edwards*, 451 U.S. at 479 (officer insisted that suspect speak with police despite request for counsel). Second, counsel can advise the suspect of his rights. Despite a *Miranda* warning, suspects often misunderstand the implications of speaking with police. *See, e.g.*, *Connecticut v. Barrett*, 479 U.S. 523, 525–26 (1987) (suspect refused to make a written statement without an attorney, but agreed to speak with police orally). Third, counsel can assist in creating a dependable record of the interrogation. Fourth, counsel can advise a suspect regarding the advantages of a potential plea bargain to aid law enforcement in solving past or ongoing crimes.

Administratively, the *Edwards* bright-line rule—like the *Miranda* rule this Court reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000)—provides judges and law enforcement with a clear and easily enforceable line demarking the boundaries of the right to counsel. As this Court observed in *Minnick*, "[t]he merit of the *Edwards* decision lies in the clarity

of its command and the certainty of its application." 498 U.S. at 151. "[T]his Court has praised *Edwards* precisely because it provides clear and unequivocal guidelines to the law enforcement profession. Our cases make clear which sorts of statements trigger its protections, and once triggered, the rule operates as a bright line." *Montejo v. Louisiana*, 77 U.S.L.W. 4423, 4429 (U.S. May 26, 2009) (No. 07-1529) (quotation marks and citations omitted).

This bright-line rule protects the rights of the accused, *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam), and aids law enforcement alike, by ensuring that confessions are reliable and admissible, *Davis*, 512 U.S. at 461. The "'rigid[ity]'" of the rule is thus a "'virtue'": It "'inform[s] police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.'" *Roberson*, 486 U.S. at 681–82 (1988) (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)); *see also Minnick*, 498 U.S. at 151 (*Edwards*'s clarity "conserves judicial resources which would otherwise be expended in making difficult determinations, and implements the protections of *Miranda* in practical and straightforward terms"). "Surely there is nothing ambiguous about the [*Edwards*] requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation ....'" 486 U.S. at 682 (quoting *Edwards*, 451 U.S. at 484).

This Court repeatedly has reaffirmed *Edwards*, explaining that once a suspect in custody has invoked his right to counsel, reinterrogation without counsel

present "may *only* occur if 'the accused himself initiates further communication.'" *Roberson*, 486 U.S. at 680–81 (emphasis added) (quoting *Edwards*, 451 U.S. at 485). In *Minnick*, the Court confirmed that *Edwards* "bar[s] police-initiated interrogation unless the accused has counsel with him at the time of questioning." 498 U.S. at 153. The Court's language was unequivocal: "Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present ...." *Id.* More recently, in *Montejo v. Louisiana*, the Court described *Edwards* in similarly unambiguous terms: "[A] defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited." 77 U.S.L.W. at 4428. Thus, once a suspect invokes his right to counsel, "*any* subsequent conversation [in the absence of counsel] must be initiated by [the suspect]." *Solem v. Stumes*, 465 U.S. 638, 641 (1984) (emphasis added); *see also Shea v. Louisiana*, 470 U.S. 51, 52, 54–55 (1985); *Wyrick v. Fields*, 459 U.S. 42, 45–46 (1982) (per curiam). Indeed, the United States, as *amicus curiae*, acknowledges that the Court's decisions in *Edwards*, *Roberson*, and *Minnick* suggest that *Edwards* is an absolute rule. United States Br. 13–14.

A straightforward application of *Edwards* to this case compels affirmance of the Maryland Court of Appeals' decision. No party disputes that Shatzer was in custody during his initial interrogation in August 2003 or that Shatzer validly invoked his right to

counsel at that time. *See* JA 10, 12, 19. Likewise, no party disputes that Shatzer was in custody during the second set of interrogations in March 2006. *See* JA 24, 28–32, 35–36; United States Br. 21. Because Shatzer already had invoked his right to counsel before the March 2006 interrogation, his alleged waiver of this right during questioning initiated by the police was invalid under *Edwards*. Having once invoked his right to counsel in response to custodial interrogation, Shatzer was "not subject to further interrogation by the authorities until counsel has been made available to him." *Edwards*, 451 U.S. at 484–85.

II. NONE OF THE STATE'S PROPOSED EXCEPTIONS TO *EDWARDS* ARE CONSISTENT WITH PRECEDENT OR LOGIC

The State and *amici* urge this Court to reverse the decision below by creating new exceptions to *Edwards*: (1) following a "substantial passage of time," Pet. Br. 24–28; (2) following a break in custody, Pet. Br. 20–24; United States Br. 11–14; or (3) following both a break in custody and a substantial passage of time, Pet. Br. 28, 32. Each of these exceptions is at odds with *Edwards*'s objectives.

A. The Court Should Not Create a "Substantial Passage of Time" Exception to *Edwards*

1. The *Edwards* rule has no passage-of-time exception. In *Edwards*, *Roberson*, and *Minnick*, the Court made clear that once a suspect in custody has expressed his desire to communicate through counsel, police may not initiate any further questioning in the absence of counsel. Although the time period between

the defendant's initial invocation of the right to counsel and reinterrogation in those cases was short, *see* Pet. Br. 26 (citing *Minnick*, 498 U.S. at 148–49 (three days); *Roberson*, 486 U.S. at 678 (three days); *Edwards*, 451 U.S. at 479 (one day)), these cases do not suggest that the *Edwards* presumption has an expiration date. If anything, a longer time period in government control warrants more—not less—protection.

The Court's failure to reference a time limit in *Edwards* should be juxtaposed with *Michigan v. Mosley*, 423 U.S. 96 (1975), decided only six years earlier. In *Mosley*, the Court concluded that a suspect's Fifth Amendment right to remain silent was "scrupulously honored" when the police immediately ceased interrogating and resumed questioning only after "the passage of a significant period of time." *Id.* at 104, 106. The Court expressly rejected the notion that the *right to silence*, once invoked, could persist indefinitely: "Clearly ... neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to *remain silent*." *Id.* at 102–03 (emphasis added); *see also id.* at 101 n.7 (stressing that the case did not involve the right to counsel).

Justice White, concurring in *Mosley*, recognized the need for fundamentally different and greater protection of the right to counsel. When the right to counsel is invoked, police have no reason to "keep the lines of communication open"; instead, the police must communicate with the suspect through an attorney. *Id.* at 110 n.2 (White, J., concurring). Once "[t]he accused [has] expressed his own view that he is not competent

to deal with the authorities without legal advice," a court "may properly ... view[] with skepticism" "a later decision at the authorities' insistence to make a statement without counsel's presence." *Id.*

In deciding *Edwards* just six years later, the Court rejected the notion that police could "scrupulously honor" the right to counsel by reapproaching a suspect after a significant period of time. Instead, the *Edwards* Court embraced Justice White's view in *Mosley* that the right to counsel requires greater protection. *Edwards*, 451 U.S. at 485; *see also Roberson*, 486 U.S. at 681. By declining to apply the *Mosley* standards to the right to counsel, the Court reached a considered decision that the *Edwards* presumption is not time-limited.

The State's substantial reliance on *Mosley* to limit *Edwards*'s applicability and to support a passage-of-time exception is thus both misplaced and ironic. Pet. Br. 14–15, 30, 31. The State's argument based on *Mosley* is *mistaken* for the same reason that led the Court in *Edwards*, and again in *Roberson*, to reject it. "[A]s *Mosley* made clear, a suspect's decision to cut off questioning, *unlike his request for counsel*, does not raise the presumption that he is unable to proceed without a lawyer's advice." *Roberson*, 486 U.S. at 683 (emphasis added); *see also Edwards*, 451 U.S. at 485.

The State's reliance on *Mosley* is *ironic* because, despite the State's contrary suggestion, Pet. Br. 30, the Court did not hold that the passage of two hours' time between interrogations was sufficient in and of itself to satisfy the obligation to scrupulously honor Mosley's rights. Instead, the Court relied heavily upon the fact that Mosley's second interrogation pertained to an entirely unrelated investigation, observing that the

"questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies." *Mosley*, 423 U.S. at 104–05; *see also id.* at 105–06 ("This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning" in part because the police "restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."). *Mosley* decidedly does not suggest that the mere passage of time could validate reinterrogation of a suspect who has invoked the right to counsel, let alone validate reinterrogation about the very same offense as to which the suspect had invoked that right.

2. The Court should not now introduce an exception to *Edwards* that voids its protection over time. NACDL is not aware of any court that has held that the mere passage of time can dissolve *Edwards* protection. The absence of such a decision is no surprise. The State's proposed "substantial period of time" exception rests upon the false assumption that the coercive pressures of custodial interrogation diminish over time. However, "there is nothing in the lapse of time itself from which to deduce that [a suspect's] original belief in his vulnerability to the pressures of custodial interrogation [has] diminished." *United States v. Green*, 592 A.2d 985, 989 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993). Instead, coercion is likely to *increase* over time. In part because of the mounting coercive pressures of custodial interrogation, the Court concluded in *Minnick* that a suspect's opportunity to consult with counsel is insufficient to lift *Edwards*

protection even when the suspect in fact had consulted with counsel. The Court reasoned that "the coercive pressures that accompany custody ... may increase as custody is prolonged." 498 U.S. at 153.

A suspect who has been incarcerated since the initial invocation of the right to counsel is subject to added coercive pressures over time. *Infra* at 15; *see also* Marcy Strauss, *Reinterrogation*, Hastings Const. L.Q. 359, 398 (1995) ("The atmosphere of incarceration works to undermine a person's free will over time, not enhance it."). As a prisoner serves his sentence, pressure builds on a prisoner to waive the right to an attorney and talk to police to curry favor for parole, good-time credits, or similar rewards. A time-based exception to *Edwards* would only increase these coercive pressures by creating an incentive for police to wear down a prisoner who has invoked his right to counsel. Indeed, a passage-of-time exception is particularly inappropriate for a suspect in continuous custody when the suspect has done nothing to indicate he has changed his mind about talking directly to police despite ample opportunity. A suspect in continuous custody need only inform the guards nearby that he wants to speak with police. *See id.* at 402–03.

Indeed, the longer the government disregards a suspect's request for counsel, the more likely a suspect will be to conclude that the government has no interest in honoring his request—thereby increasing the suspect's sense of coercion. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion

to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686.

3. A time-based exception also would significantly erode *Edwards*'s clarity, undermining its administrative simplicity. Police and courts would become embroiled in case-by-case analysis regarding when and whether the passage of time has sufficiently removed the coercive pressures of custodial interrogation to permit reinterrogation. "At what point in time and in conjunction with what other circumstances does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part?" *Green*, 592 A.2d at 989. Would the conditions of the suspect's confinement during the lapse in interrogation be relevant to the amount of time that must pass before *Edwards* expires? What should courts look to in order to determine whether the exception triggers?

The Court should not reject the clear and easily administrable *Edwards* rule simply because it places responsibility upon police to determine whether a suspect has previously invoked the right to counsel. *See* United States Br. at 20. *Edwards* "attach[es] no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." *Roberson*, 486 U.S. at 687. That same responsibility to respect a suspect's request should apply across jurisdictions. Courts often have imputed knowledge that a suspect invoked his right to counsel from one jurisdiction to another, recognizing that governments often work as teams. *See United States v. Scalf*, 708 F.2d 1540, 1544–45 (10th Cir. 1983) (per curiam). By imputing the knowledge of

the initial interrogator to other officers, "[l]aw enforcement officers working in teams should be discouraged from violating the accused's constitutional rights by failing to ascertain or advise one another whether those rights had been previously asserted." *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981); *see also White v. Finkbeiner*, 687 F.2d 885, 887 n.9 (7th Cir. 1982) ("[I]t would be inconsistent with *Edwards* to find [the defendant's] confession admissible because the second interrogators were not informed of his request for counsel. To so hold would be tantamount to creating a 'good faith' exception to the *Edwards* rule ... and might permit relatively easy circumvention of [*Edwards*]."), *vacated on other grounds*, 465 U.S. 1075 (1984).[2] Most fundamentally, "*Edwards* focuses on the state of mind of the suspect and not of the police." *Roberson*, 486 U.S. at 687.

4. To be sure, the Court could preserve the benefits of a bright-line rule by selecting an arbitrary time period after which *Edwards*'s protections would lapse. But taking this step would be inconsistent with this Court's constitutional criminal procedure jurisprudence. Indeed, the Court has been particularly reluctant to specify a fixed time period for determining when an accused's constitutional rights have been denied where, as here, varying circumstances make it "impossible to determine with precision" where the

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[2] In any event, this case involves police from the same detective unit who failed to check an easily accessible record documenting Shatzer's invocation of the right to counsel, the Court has no reason to address Petitioner's concerns about holding police from a different jurisdiction responsible for a suspect's past invocations of the right to counsel. *See* Pet. Br. 31; United States Br. 20.

Court should draw the line. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). For example, the Court has declined to identify a particular time period within which a trial must be held to satisfy the Speedy Trial Clause. Observing that the varying circumstances make it impossible to "say how long is too long," the Court declined to specify particular limits in this context. *Id.* at 521–23. Likewise, in this case, no principled basis exists for selecting a particular time period after which *Edwards* protection no longer applies, and the appropriate time period might well vary depending upon the circumstances of custody. Because any time-based exception would thus be arbitrary and lead to widely inconsistent results, the Court should decline to create one.

B. The Court Should Not Create a Break-in-Custody Exception to *Edwards*

The State "has not denied that respondent was 'in custody' for purposes of both *Miranda* and *Edwards* during the August 7, 2003 and March 2006 interviews and that he was subject to 'interrogation' during those times." United States Br. 21. Instead, the State argues that Shatzer was not in custody during the time period between these two interrogations and that this alleged break in custody should serve to terminate the effects of Shatzer's prior request for counsel.

The "break-in-custody" exception the State advocates would be inconsistent with the *Edwards* rule. This Court has never held that *Edwards* permits renewed custodial interrogation following a break in custody, nor should it now. *Edwards* protects a suspect who has indicated he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

This discomfort is precisely the state of mind that *Edwards* presumes to persist ...." *Roberson*, 486 U.S. at 684. The *Edwards* presumption should not disappear simply because police have released the suspect from custody and given him some time to consider going it alone.

The State's flawed argument rests on a misreading of language in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In *McNeil*, the Court observed in dicta that a suspect's statements should be presumed involuntary "assuming there has been no break in custody." *Id.* at 177. But this language simply acknowledges that *Edwards* does not apply when a suspect is not in custody. The Court's recent discussion in *Montejo* properly frames the role of custody and the limits of *Edwards* protection. "If the defendant is not in custody then [the *Miranda-Edwards* regime] do[es] not apply; nor do they govern other, noninterrogative types of interactions ...." 77 U.S.L.W. at 4428. In short, *Edwards* does not forbid police from asking suspects questions when suspects are not in custody. If a suspect is placed back into custody, however, *Edwards* continues to protect a suspect who has clearly indicated that he is unable to handle the coercive pressures of custodial interrogation without counsel.

A fresh *Miranda* warning does not somehow rebut the *Edwards* presumption by vitiating the coercive environment of reinterrogation. If police reapproach a suspect who has previously invoked his right to counsel, that suspect may well assume that invoking his right is not effective and forego invoking his rights. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without

counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686. When again confronted with a renewed interrogation, the suspect may not be able to resist the coercive environment he perceives. "[T]he mere repetition of the *Miranda* warnings [should thus] not overcome the presumption of coercion ...." *Id.*

Indeed, the second custodial interrogation is, if anything, more intimidating. A suspect should not be penalized if he fails to make a second request for counsel in that highly charged environment. "[I]f any assumption can be made, it should be that a suspect in this position would want to pursue precisely the same course as before: that is, deal with the police only with the buffer and protection of counsel." Strauss, *supra*, at 389. Although a break in custody can lessen the restrictions upon a suspect's freedom for a short time, the break does not enhance his ability to handle the coercive pressures of renewed custodial interrogation, nor does his failure to persist in demanding counsel imply a change of heart.

If the *Edwards* presumption expired upon a break in custody, courts would be granting police license to badger suspects. Police could easily adopt a repetitive "catch-and-release" approach to questioning suspects who invoke their Fifth Amendment right to counsel. Indeed, lower court decisions applying a break-in-custody exception all but sanction this approach by, in some cases, denying *Edwards* protection to suspects released and then subjected to custodial reinterrogation the *next day* or even within a matter of *hours*. *See, e.g.*, *Dunkins v. Thigpen*, 854 F.2d 394, 396–97 (11th Cir. 1988) (police picked up defendant at

work the morning after defendant attempted to invoke his Fifth Amendment right to counsel), *cert. denied*, 489 U.S. 1059 (1989); *State v. Alley*, 841 A.2d 803, 809–10 (Me.) (police released and then recaptured suspect within six hours), *cert. denied*, 541 U.S. 1078 (2004). These catch, release, and recapture tactics enhance the coercive pressures a suspect faces by creating a harassing, uncertain environment.

A so-called break-in-custody exception also would undermine the clarity of *Edwards*'s bright-line rule. This Court has recognized that "the task of defining 'custody' is a slippery one ...." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). Yet under the State's proposal, judges and "[p]olice officers would be forced to make difficult judgment calls" regarding when the suspect has been released from custody to trigger this exception. *Davis*, 512 U.S. at 461. For example, a break-in-custody exception would unnecessarily complicate a court's custody analysis as applied to inmates. Prisoners in the general prison population share common restrictions on their freedom. But if *Edwards* depended on the level of a prisoner's confinement, inmates frequently would pass in and out of custody with modifications in their conditions of incarceration. "Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle." *Minnick*, 498 U.S. at 155. Given this difficulty, this Court should eschew a regime "in which *Edwards* protection could pass in and out of existence multiple times." *Id.* at 154–55.

C. The Court Should Not Create a Combined Break-in-Custody and Passage-of-Time Exception to *Edwards*

The State offers the Court a third possible exception to *Edwards*, combining a break in custody with the passage of time. Pet. Br. 28–32. The Court should reject this composite approach, which suffers from the same defects as its component parts.

An *Edwards* exception that combines a break in custody with a passage of time is based in part upon the premise that a break in custody "give[s] the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel." *People v. Storm*, 52 P.3d 52, 63 (Cal. 2002) (emphasis omitted), *cert. denied*, 537 U.S. 1127 (2003). This idea is largely derived from two pre-*Minnick* cases, *United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983), and *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), both of which placed significance on the suspect's opportunity to consult with counsel while each was released from custody. *See Dunkins*, 854 F.2d at 397 ("If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar the admission of any subsequent statements."); *Skinner*, 667 F.2d at 1309.

The Court has long since rejected this logic. In *Minnick*, the Court concluded that the opportunity to consult counsel neither negates a suspect's request to communicate with police only through counsel nor "remove[s] the suspect from persistent attempts by officials to persuade him to waive his rights." 498 U.S. at 153. Providing a suspect the opportunity to consult with counsel while out of custody is not a substitute for

the presence of counsel during interrogation. Strauss, *supra*, at 388.

The sole virtue of combining a break-in-custody exception with a passage-of-time requirement would be to reduce the incentive for police to rely on pretextual breaks in custody to evade *Edwards*. Yet simply placing a time buffer between two custodial interrogations does not eliminate this incentive structure. Without the clarity of the *Edwards* rule, courts will engage in a case-by-case analysis that likely would encourage badgering through pretextual catch-and-release reinterrogation within short time intervals.

Designating a specific time period after which *Edwards* expires following a break in custody would provide some clarity, but the costs of this approach far outweigh the benefits. As discussed above, drawing the line would be both arbitrary and difficult. *Supra* at 16–17. Without a principled basis for drawing the line, doing so would be both challenging and dangerous. If the time period is too short, "the fear of badgering and coercing confessions ... becomes all too real." Strauss, *supra*, at 397. Police would have a clear timetable for badgering suspects.

The Court should be particularly hesitant to recognize a combined exception in light of its recent ruling in *Montejo v. Louisiana*. In *Montejo*, the Court overturned the rule of *Michigan v. Jackson*, which protected an accused's Sixth Amendment right to counsel by "forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding." 77 U.S.L.W. at 4424 (citing *Michigan v. Jackson*, 475 U.S. 625, 636 (1986)). In *Montejo*, the Court emphasized that overruling *Jackson* did not deprive suspects of the

right against compelled self-incrimination because *Edwards* sufficiently protected that right. The Court observed that "the *Miranda-Edwards-Minnick* line of cases ... *is not in doubt.*" *Id.* at 4428 (emphasis added).

The Court further explained that because the *Edwards* "regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence,' before his arraignment, it is hard to see why it would not also suffice to protect that same choice *after arraignment.*" *Id.* (quoting *Cobb*, 532 U.S. at 175 (Kennedy, J., concurring) (emphasis added). Because states generally do not take defendants back into police custody following arraignment, but release them on bail or send them to a regional detention facility, *Montejo* clearly contemplates that *Edwards*'s protection does not end the moment a suspect leaves the police. More broadly, the Court in *Montejo* "change[d] the legal landscape ... in part based on the protections already provided by *Edwards*," leaving *Edwards* as a suspect's main protection against custodial interrogation after arraignment. *Id.* at 4429; *see also id.* at 4428 ("*Jackson* is simply superfluous."); *id.* (noting that there is no reason to retain *Jackson* if the policies underlying the *Jackson* rule are "being adequately served" through *Edwards*). The Court should decline to undermine the sufficiency of the *Edwards* regime to protect suspects' Fifth Amendment right to counsel by creating new exceptions to *Edwards*'s clear and unequivocal guidelines.

III. BECAUSE SHATZER WAS CONTINUOUSLY "IN CUSTODY," A BREAK-IN-CUSTODY EXCEPTION WOULD NOT APPLY IN THIS CASE

Even if this Court were inclined to consider a break-in-custody exception to *Edwards*, the Court should not create such an exception in this case because, as a prison inmate, Shatzer remained in continuous custody since he initially invoked his Fifth Amendment right to counsel. Incarcerated prisoners such as Shatzer are "in custody" for purposes of both the *Miranda* and *Edwards* prophylactic rules. To hold otherwise would ignore the reality that the prison environment places precisely the restrictions on freedom that *Miranda* and *Edwards* held were presumptively coercive.

1. To determine whether a defendant is "in custody" for *Miranda*, this Court employs a reasonable-person approach. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *see also Stansbury v. California*, 511 U.S. 318, 323 (1994) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on ... subjective views ...."). "'[T]he ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury*, 511 U.S. at 322 (citation omitted) (alteration in original). Thus, a defendant is "in custody" for *Miranda* purposes if a reasonable person would understand he was under "formal arrest" or restrained in his "'freedom of movement [to] the degree associated with a formal

arrest.'" *Id.* (citation omitted); *see also Berkemer*, 468 U.S. at 442.

A reasonable person would undoubtedly understand incarceration as a restraint on his freedom of movement to at least the degree associated with formal arrest. While prisons may vary in their conditions of confinement, all prisons share four common factors that create a particularly coercive environment. First, prison "deprive[s] [inmates] of [their] freedom ... in [a] significant way." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). Prisoners are physically confined in a limited space, often in the same place and sometimes alone for several hours each day. In addition to the physical limits, inmates can only go places and do things as the prison authority permits. Second, prisoners have reduced expectations of privacy as recognized under this Court's Fourth Amendment jurisprudence. *See Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Without an expectation of privacy, a prisoner can feel powerless to resist the authorities' requests. Third, the government places prisoners under constant surveillance. The government's ever-watching eye reminds the prisoner that the government controls his life. Fourth, prisoners often have pressure to cooperate with authorities, including pressure to speak with police without counsel because many state governments—including Maryland—consider a prisoner's cooperation with law enforcement authorities favorably for purposes of parole. *See, e.g.*, Md. Code Regs. 12.08.01.18(A)(3) (2009) (considering "[t]he offender's behavior and adjustment" and "[t]he offender's current attitude toward society, discipline, and other authority" for parole).

The custodial pressures of prison stand in stark contrast to the freedoms a citizen enjoys when not in custody. "When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering." *Montejo*, 77 U.S.L.W. at 4428. On the other hand, when an inmate is incarcerated, he is not in a position to avoid police, but is restricted in a location where police can easily question him. A prisoner's long-term confinement and accessibility to police make him very different from those people who the government has temporarily restricted, but whom it has *not* placed in custody for *Miranda* purposes. Unlike people subject to a traffic or *Terry* stop, prisoners are restricted in their freedom for far longer than a "temporary and brief" time and are "completely at the mercy of the [State]." *Berkemer*, 468 U.S. at 437-38. This stark contrast in time and control between a prisoner and the suspect questioned during a traffic stop in *Berkemer* support holding that a prisoner is in custody for *Miranda* purposes.

Just as incarcerated prisoners are "in custody" for *Miranda* purposes, they are equally "in custody" for *Edwards* purposes. *Edwards* is a "corollary to *Miranda*[]," *Roberson*, 486 U.S. at 680. Accordingly, the definition of custody should be the same in both contexts. As the United States points out in its brief, "[i]t is logical to use the same definition of 'custody' for purposes of both the rule and its corollary ...." United States Br. 19. Both *Miranda* and *Edwards* established rules to protect suspects' Fifth Amendment rights against coercion during custodial interrogation. *Edwards*, 451 U.S. at 484–85; *Miranda*, 384 U.S. at 474. Such coercion can take the form of badgering in police custody or the more subtle pressures of incarceration.

Both are "inherently coercive." *Barrett*, 479 U.S. at 531. Statements made in this context after the invocation of counsel are presumed to be "the product of compulsion, *subtle or otherwise*." 384 U.S. at 474 (emphasis added).

2. In contrast to this Court's common-sense, reasonable-person approach to custody, the State argues for an unpredictable approach that misapplies precedent. Specifically, the State argues that prisoners are not "in custody" for *Miranda* or *Edwards* if the police do not badger the suspect or place a suspect in circumstances distinct from those to which he is routinely exposed as an incident of incarceration. Pet. Br. 22–24. According to the State, "[r]estraints necessarily imposed by incarceration become familiar matters to an inmate and do not create the coercive circumstances in which it must be presumed that one's will is overborne." Pet. Br. 22. Only after an interrogator "[i]mpos[es] ... *additional* restraint" will a suspect "return ... to a custodial state and [be] entitle[d to] ... *Miranda* warnings before any interrogation." Pet. Br. 23 (emphasis added). This argument is fundamentally flawed because it ignores this Court's reasonable-person approach from *Berkemer* and instead applies an alternative, erroneous concept of custody.

The State's analysis erroneously requires courts to discount what a reasonable person might think of prison and instead to assume that inmates have grown so accustomed to prison that the coercive pressure of incarceration somehow evaporates. Pet. Br. 22–24; *see also* United States Br. 18. In other words, to evaluate whether a prisoner is "in custody" under this approach, courts must reset the baseline against which the

coercive pressures of custodial interrogation are measured to that of a hypothetical "reasonable prisoner." The State's proposed "in custody" standard would lead to absurd results: a prisoner who is normally immobilized in a maximum security prison would neither be "in custody," nor would he be under coercive pressure to waive his right to counsel as long as the questioner added no additional restraints on his freedom.

Moreover, this Court's precedents make clear that determining whether a suspect is in custody for *Miranda* and *Edwards* purposes does not depend on assessing the "coercive pressures" that the suspect may feel subjectively. Rather, this Court repeatedly has emphasized that the key is whether the government has restrained the suspect's freedom in a manner similar to arresting him. With respect to persons such as Shatzer incarcerated in prison, the answer to that inquiry is obvious.

The United States argues that this Court took into account the background circumstances of a suspect questioned on a bus in a Fourth Amendment seizure case. *See* United States Br. 17 (citing *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991)). But this Court did not disregard any government-imposed restrictions on a person's freedom in *Bostick*. Rather, this Court held that the police did not seize the bus passenger in that case because he *chose* to ride the bus. The State and *amici* cannot cite any of this Court's cases in support of their claim that courts may properly separate the restrictions imposed by an interrogator from other state-imposed restrictions on the suspect's freedom. *See, e.g.*, Pet. Br. 22–23; United States Br. at 16–17. All state-imposed restrictions on freedom that

are of the kind typically associated with formal arrest constitute "custody" under *Miranda*.

The Court need not deny the obviously custodial nature of prison to ensure that incarcerated prisoners are not rendered forever "question-proof," as the State and *amici* contend. Pet. Br. 22; United States Br. 19–20; Florida Br. 15. Although prisoners remain in custody for *Miranda* and *Edwards* purposes, the "on-the-scene questioning" exception would continue to apply to inmates. *See Miranda*, 384 U.S. at 477–78. Additionally, prisoners may always self-initiate conversation with law enforcement. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044–45 (1983). Many of the courts of appeals cases the State cites to claim that prisoners are not always in custody for *Miranda* purposes could have been decided by applying either of these two exceptions—without rendering the defendants in those cases "question-proof." *See Garcia v. Singletary*, 13 F.3d 1498, 1489 (11th Cir.) (on-the-scene questioning), *cert. denied*, 513 U.S. 908 (1994); *Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978) (same); *Saleh v. Fleming*, 512 F.3d 548, 551 (9th Cir. 2008) (self-initiation). And, of course, the State can always choose to have counsel present.

Rather than create a new standard by which to determine the custodial status of prisoners in this case, the Court should adhere to its well-established standards for determining custody. Because incarceration in prison undoubtedly constitutes "custody" under *Miranda* and *Edwards*, and Shatzer was continuously incarcerated between his 2003 and 2006 interrogations, this case simply does not constitute an occasion for considering the

establishment of a break in custody exception to *Edwards*'s clear rule.

IV. AT THE VERY LEAST, *EDWARDS* PROHIBITS OFFICERS IN THE VERY SAME JURISDICTION FROM REINTERROGATING AN INCARCERATED SUSPECT CONCERNING THE VERY SAME OFFENSE AS TO WHICH THE SUSPECT ORIGINALLY INVOKED THE RIGHT TO COUNSEL

Even if the Court were inclined to adopt any of the limitations on *Edwards* urged by the State, the Court should not go so far as to eliminate the *Edwards* rule where, as here, officers within the same jurisdiction reinterrogated a suspect regarding the same investigation for which the suspect initially invoked the right to counsel. At an absolute minimum, police cannot subject a suspect to further questioning without counsel when the suspect invoked his right to counsel with respect to the same investigation or offense, especially when the suspect is incarcerated. A contrary holding would remove the core protection *Edwards* provides when a suspect has invoked his right to counsel.

When a suspect questioned by police as to a particular offense has invoked his right to counsel under *Edwards*, that invocation constitutes a clear expression that the suspect does not feel comfortable with any further custodial interrogation regarding that offense without counsel present. Even if it were true that a break in custody or the passage of time could wipe the slate sufficiently clean to permit reinterrogation on a *different* charge or investigation,

when a suspect has expressed his need for the assistance of counsel as to the matter being investigated, police have no reason to assume that a break in custody or the passage of time has caused the suspect to change his mind. Indeed, the Court's reasoning in *Mosley* strongly suggests the opposite is true: the minimum "reasonable interpretation" of a suspect's invocation of his Fifth Amendment right to counsel in the context of a particular investigation is that he does not wish to proceed with further custodial interrogation on that subject. *Cf. Mosley*, 423 U.S. at 104–05.

The State and *amici* complain of a parade of horribles that would result if the Court were to reaffirm *Edwards* and its progeny. In particular, the State and *amici* contend that absent exceptions to *Edwards*, law enforcement would face substantial administrative difficulties in discerning whether a suspect previously has invoked the right to counsel in a different jurisdiction. Pet. Br. 31; United States Br. 20. No concern about the difficulty of ascertaining whether a suspect has previously invoked the right to counsel in a different jurisdiction could possibly justify creating an exception to *Edwards* that would permit reinterrogation as to the very same offense, by the same jurisdiction, as to which the suspect had previously invoked the right to counsel. Police should be held responsible for knowing the contents of the investigative files pertaining to the very offenses as to which they wish to interrogate the suspect.[3]

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[3] NACDL recognizes that "society[] [has a] compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). However, *Edwards* does not prevent police from investigating crimes, and

The State and *amici* likewise contend that without curtailment of *Edwards*, individuals serving long prison sentences would be rendered forever "question-proof" as to any offense. Pet. Br. 22. Even setting aside the fact that this assertion utterly disregards the ability of law enforcement officers to reinterrogate these individuals *with counsel present*, *see Minnick*, 498 U.S. at 150, this concern once again cannot justify an exception that would permit disregarding a suspect's invocation of the right to counsel as to the very offense in connection with which the suspect had previously invoked the right.

In reality, the exceptions the State and its *amici* advocate would gut *Edwards*'s core holding: A suspect who has "expressed his desire to deal with the police only through counsel[] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication ... with the police." *Edwards*, 451 U.S. at 484–85. Here, no party disputes that Shatzer clearly "expressed his desire to deal with the police only through counsel" by invoking his right to counsel in response to the initial, custodial interrogation. Nevertheless, without ever providing Shatzer with counsel and without so much as investigating whether he previously invoked the right to counsel, the State subjected Shatzer to reinterrogation with regard to the very same offense. To conclude in these circumstances that Shatzer's

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rules like *Edwards* that exclude confessions do not necessarily reduce conviction rates. *See, e.g.*, Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. Chi. L. Rev. 435, 457 (1987) (finding no significant decline in conviction rates in a Pittsburgh study even with a decrease in the confession rate).

supposed waiver of his Fifth Amendment right to counsel during the second interrogation was valid would eviscerate the presumption that lies at the heart of *Edwards*.

It would be especially incongruous to apply break-in-custody or passage-of-time exceptions to incarcerated suspects such as Shatzer. Whatever impact a break in custody or passage of time may have on a suspect outside of prison, a "break" in custody or in time does not have the same effect on a continuously imprisoned suspect. *See supra* at 14, 26, 27–28.

Accordingly, the Court should conclude that even if break-in-custody or passage-of-time exceptions might *otherwise* exist, they do not apply to a suspect reinterrogated without counsel regarding the very same offense for which he invoked the right to counsel. This minimal protection is especially warranted when suspects like Shatzer remain in prison throughout the time period between the first and second interrogations.

CONCLUSION

The judgment of the Court of Appeals of Maryland should be affirmed.

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